THE LAWYERS REPORTS ANNOTATED

BOOK L.

ALL CURRENT CASES OF GENERAL VALUE AND IMPORTANCE, WITH FULL ANNOTATION.
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ROCHESTER, N. Y.
THE LAWYERS' CO-OPERATIVE PUBLISHING COMPANY.
1901.

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LAWYERS' REPORTS

ANNOTATED.

GEORGIA SUPREME COURT.

Mrs. V. A. MORRIS *et al., Plffs. in Err.*,
v.
Harry DODD, Trustee, etc., of John F. Morris, Bankrupt.

(..... Ga. .....)

*A policy of insurance on the life of a bankrupt, though payable to his legal representatives, does not, if it have no cash-surrender value, vest in the trustee as assets of the bankrupt's estate. (a) Accordingly, where a husband, within four months prior to the filing of his petition in bankruptcy, transferred to his wife an insurance policy on his life, which before such transfer was payable to his legal representatives, it was erroneous on the petition of the trustee, filed upon the death of the bankrupt, pending the proceedings in bankruptcy, for the court to enjoin the widow from collecting, and the insurance company from paying to her, the amount due upon the policy; it appearing that it had no cash-surrender value, either when the transfer was made or the petition in bankruptcy was filed.

*Headnote by FISH, J.

(April 11, 1900.)

ERROR to the Superior Court for Fulton County to review a judgment in favor of plaintiff in an action brought to enjoin defendants from diverting the proceeds of policies of insurance upon the life of John F. Morris from the payment of his debts. *Reversed.*

The facts are stated in the opinion.

NOTE.—*Life insurance as assets of bankrupt or insolvent.*

I. *Scope of note.*

This note covers only the rights of the trustee or assignee in bankruptcy or insolvency in, or the rights of creditors to reach generally, a life insurance policy while the insured is living and before its maturity, and is not intended to include the rights of creditors in the proceeds of the policy after the death of the insured or the maturity of a policy payable during his lifetime.

II. *Bankruptcy or insolvency of insured or assignor of policy.*

a. *Policy payable at death of insured.*

1. *Policy payable to insured or his estate or personal representatives.*

Under the bankruptcy act of 1898, § 70 (5), it is expressly provided that the trustee in bankruptcy shall be vested by operation of law with the title of the bankrupt, except so far as it is exempt, in all property which, prior to the filing of the petition, could have been transferred by him, or levied on and sold, provided that when the bankrupt has an insurance policy which has a cash-surrender value payable to himself, his estate or legal representatives, he may, within thirty days after such surrender value has been ascertained, pay the same to the trustee, and continue the policy free from the claims of all participating creditors; and that, if he does not do so, it shall pass to the trustee as assets. Where, however, the policy has no cash-surrender value, the trustee in bankruptcy takes no interest therein.

Thus, the main case of MORRIS v. DODD holds that a life-insurance policy, payable to the legal representatives of the insured, which has no cash-surrender value at the time of filing the petition in bankruptcy, does not pass to the trustee as assets; and the fact that the in-

Messrs. **J. A. Anderson, King & Anderson, Dorsey, Brewster, & Howell,** and **Arthur Heyman,** for plaintiffs in error:

It cannot prefer a creditor in a legal sense, to give to that creditor an executory contract, which at the time of transfer has no value, and which depends on many contingencies, if it ever becomes valid.

Stout v. *Yaeger Mill. Co.* 4 McCrary, 486, 13 Fed. Rep. 804; *Re Pearson*, 95 Fed. Rep. 426; *Re Little River Lumber Co.* 92 Fed. Rep. 589; Loveland, Bankruptcy, p. 297.

Under the common law and the law of our state, the transfer of property to delay, hinder, defraud, or prefer creditors must be property having a value.

Hubbard v. *Turner*, 93 Ga. 754, 30 L. R. A. 593, 20 S. E. 640; *Re Lange*, 91 Fed. Rep. 361; *Re Steele*, 98 Fed. Rep. 79; *Re McKinney*, 15 Fed. Rep. 535; *Holt* v. *Everall*, 34 L. T. N. S. 602; *Ætna Nat. Bank* v. *United States L. Ins. Co.* 24 Fed. Rep. 770; *Re Dews*, 96 Fed. Rep. 181.

The trustee acquires title as of the date of the adjudication, and this carries with it the undisputed proposition that, after the date of this adjudication, the bankrupt works for himself, earns for himself, and any property acquired thereafter by him belongs to him free from any claim on the part of the bankrupt estate.

Loveland, Bankruptcy, § 175; *Re Rennie*, 2 Am. Bankr. Rep. 182; *Re Harris*, 2 Am. Bankr. Rep. 359; *Traer* v. *Clews*, 115 U. S. 528, 29 L. ed. 467, 6 Sup. Ct. Rep. 155.

There can be in his bankrupt estate no insurable interest on his life.

If there is no insurable interest then the policy must fall as a wagering policy.

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sured had assigned the policy to his wife within four months before the filing of the petition makes no difference.

And *Re* Buelow, 98 Fed. Rep. 86, holds that life policies having no cash-surrender value, and no value for any purpose except as they may become valuable on the death of the insured if the premiums are kept paid, are not assets of the bankrupt's estate. The referee in this case held (2 Nat. Bankr. News, 26) that where the policy is payable to the insured, his estate or personal representative, and has a cash-surrender value, it should be converted into cash unless the bankrupt pays the cash-surrender value of the policy, as provided in the bankrupt act, § 70 (5).

Re Steele, 98 Fed. Rep. 78, following *Re* Lange, 91 Fed. Rep. 361, holds that the surrender value of a policy payable to the insured, his executors, administrators, or assigns is a part of his estate in bankruptcy, under § 70 (5) of the bankrupt act, and passes to his trustee unless he avails himself of its provisions for payment of its cash-surrender value, although § 6 provides that such act shall not affect the allowance to bankrupts of the exemptions prescribed by the laws of the state of their residence, and the laws of the state of the bankrupt's residence make such a policy exempt.

Irrespective of the provisions of the bankrupt act of 1898, the courts which hold that creditors have any rights in the policy seem inclined to confine such interest to the cash-surrender value of the policy.

Thus, Barbour v. Larue, 21 Ky. L. Rep. 94, 51 S. W. 5, holds that an insurance policy on which only one premium has been paid, and which has no withdrawal or pecuniary value, does not pass under a voluntary assignment for creditors,—especially where the assignee, when applied to for payment of an amount due on the note for part of the first premium, declines to pay it, and refers to a creditor to whom the insured has assigned the policy subsequent to the assignment for creditors, and such creditor pays the subsequent premiums until the death of the insured.

And in Holt v. Everall, 34 L. T. N. S. 599, L. R. 2 Ch. Div. 266, 45 L. J. Ch. N. S. 433, 24 Week. Rep. 471, a husband, after the passage of the married woman's act of 1870, surrendered policies on his own life on which he had paid only one premium, and which had no surrender value, taking out new policies payable to his wife if she survived him, the premiums on the new policies being the same as on the old policies, and being paid from the wife's separate property. Within two years after the change he presented a petition for liquidation in the bankruptcy court, and soon after died. The court held that, as the old policies had no surrender value, and as, under the married women's act, § 10, which was held to apply, the creditors had no interest in a policy taken out for the wife's benefit, except to the amount paid by the husband for premiums with intent to defraud creditors, the trustee in bankruptcy had no interest in the policies.

And *Re* McKinney, 15 Fed. Rep. 535, holds that the assignee in bankruptcy of one who has a life policy payable to his executors, administrators, or assigns, with an equal annual premium during the bankrupt's life, takes only the surrender value of the policy, as he has no insurable interest in the bankrupt's life, at least after his discharge, and would not be entitled to keep the estate unsettled for an indefinite period until the bankrupt's death. And where the assignee did nothing to keep the policy alive, and the bankrupt's wife, under the belief that the policy was for her benefit, paid six annual premiums thereafter before her husband's death, the court held that the assignee might transfer the policy to her on receipt of its value at the time the bankruptcy occurred. The policy also provided that a transfer should not be valid without the consent of the company, and that any assignment should be subject to proof of interest, and the court held that this would further limit the assignee's recovery to the surrender value.

And in Barbour v. Connecticut Mut. L. Ins. Co. 61 Conn. 240, 23 Atl. 154, in which it was claimed by a subsequent creditor that the surrender of policies by an insolvent payable to his legal representatives, receiving in place thereof policies payable to his wife, was fraudulent as to creditors, the transfer having been made after an assignment for creditors and a short time before his discharge, the court stated that the facts that only two premiums had been paid, and that the assignee could only have obtained paid-up policies for a very small amount, and that the policies had no cash surrender value, and the assignee could not possibly have increased the cash in his hands thereby, should be considered on the question of fraud. One of the policies considered in this case was an ordinary life policy, the other payable on the death of the insured, but on which only ten payments were to be made.

Some cases hold that where the bankrupt or insolvent fails to deliver up a policy, and continues to pay the premiums, the assignee in bankruptcy or insolvency is entitled to the pol-

Exchange Bank v. *Loh*, 104 Ga. 446, 44 L. R. A. 372, 31 S. E. 459; *Connecticut Mut. L. Ins. Co.* v. *Fisher*, 30 Fed. Rep. 662.

The creditors could not have levied upon these policies, and sold them under judicial process.

Stout v. *Yaeger Mill. Co.* 4 McCrary, 486, 13 Fed. Rep. 804; *McKown* v. *Manhattan L. Ins. Co.* 91 Fed. Rep. 354; *Re Little River Lumber Co.* 92 Fed. Rep. 585; *Re Pearson*, 95 Fed. Rep. 425.

Every case bearing upon a life insurance policy under bankruptcy acts clearly demonstrates that it is only the cash surrender value of a life insurance policy that enters into and becomes a part of the estate in bankruptcy.

Re Buelow, 98 Fed. Rep. 87; *Re Steele*, 98 Fed. Rep. 79; *Re McKinney*, 15 Fed. Rep. 535; *Re Newland*, 7 Ben. 63, Fed. Cas. No. 10,171; *Holt* v. *Everall*, 34 L. T. N. S. 599; *Ætna Nat. Bank* v. *United States L. Ins. Co.* 24 Fed. Rep. 770; *Re Dews*, 96 Fed. Rep. 181; *Re Lange*, 91 Fed. Rep. 361.

The mutual reserve policy under the laws of New York is exempt from any claim on the part of the creditors.

Ins. Laws of N. Y. §§ 211, 212; *Sulz* v. *Mutual Reserve Fund Life Asso.* 145 N. Y. 563, 28 L. R. A. 379, 40 N. E. 242.

Messrs. **Mayson & Hill, O. E. Horton,** and **M. C. Horton,** for defendant in error:

A policy of life insurance is a chose in action, governed by the same principle applicable to other agreements involving pecuniary obligations.

Hutson v. *Merrifield*, 51 Ind. 24, 19 Am. Rep. 722; *United States L. Ins. Co.* v. *Ludwig*, 103 Ill. 305; *Central Nat. Bank* v. *Hume*, 128 U. S. 204, 32 L. ed. 375, 9 Sup.

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icy subject to the bankrupt's right to recover the amount of the premiums paid after his bankruptcy occurred.

Thus, *Re* Smith, 12 Week. Rep. 534, holds that where an insolvent debtor omitted from the schedule filed in the insolvent debtor's court all reference to a policy effected on his life eighteen months before, and continued to pay the premiums thereon until his death, his personal representatives would be entitled to receive the amounts paid for premiums, the balance going to the assignee for division among the creditors.

And Schondler v. Wace, 1 Campb. 487, holds that where a bankrupt fails to deliver up a policy on his life, or discover it to the commissioners or his assignees, and afterwards assigns it to one who pays up arrears on the premiums, nonpayment of which would soon have caused it to be forfeited, and thereafter assigns it for a valuable consideration, after which the bankrupt dies, the assignees in bankruptcy are entitled to recover the amount due on the policy after deducting the amount paid out for premiums by the assignee of the policy.

For the extent of the interest of creditors where the wife is the beneficiary, see *infra*, II. a, 2.

For the extent of such interest where the policy is assigned or made payable to a creditor, see *infra*, II. a, 3 (e).

For the extent of their interest in an endowment or tontine policy, see *infra*, II. b.

For the extent of their interest in case of the bankruptcy or insolvency of the beneficiary, see *infra*, III.

The courts, however, were not agreed prior to the passage of the bankrupt act of 1898, as to whether policies of this kind constitute assets which the creditors can reach, or which pass to the assignee or trustee in bankruptcy or insolvency.

Thus, Shenk v. Franke, 10 Lanc. Bar, 146 (Brightly (Pa.) Digest), holds that a policy of life insurance payable to the heirs, executors, administrators, or assigns passes as a chose in action to his assignee for creditors.

And Larue v. Larue, 96 Ky. 326, 28 S. W. 790, holds that whether policies are intended to pass under an assignment for creditors is a question of fact to be determined from the language of the assignment and the intention of the assignor in procuring the assignment, and that a policy payable to the insured, his order or creditors, passes under an assignment which, after giving a schedule of his real and personal property, provides that if he has omitted any property, accounts, or claims not mentioned therein the same is transferred to the assignee, where it appears that the assignor intended it to pass. This case afterwards came up on a second appeal as Barbour v. Larue, 21 Ky. L. Rep. 94, 51 S. W. 5, where it was held that the policy did not pass because it had no withdrawal or pecuniary value.

And in Burton v. Farinholt, 86 N. C. 260, the court stated that a policy for the benefit of the insured, his executors, administrators, or assigns might, notwithstanding its intangible form, be reached and made subject to the debts of the insured. This statement was *obiter*, however, as the action was brought after the death of the insured to subject the proceeds of the policy to the payment of his debts, notwithstanding a voluntary assignment of the policy to his children.

And Anthracite Ins. Co. v. Sears, 109 Mass. 383, holds that a bill in equity may be maintained, under Mass. Gen. Stat. chap. 113, § 2, relating to any property, right, title, or interest, legal or equitable, of a debtor within the state which cannot be attached or taken on execution to reach and apply a policy capable of assignment on the life of the debtor, and the fact that the insurance company is a foreign one makes no difference.

On the other hand, Day v. New England L. Ins. Co. 111 Pa. 507, 56 Am. Rep. 297, 4 Atl. 748, holds that a policy payable on his death to the insured, his executors, or administrators, for the benefit of his widow, if any, cannot during his lifetime and while he is a widower, be attached for his debts.

And Huribut v. Huribut, 45 Hun, 189, 1 N. Y. Supp. 854, holds that an assignment for creditors by one whose life is insured, the policy being payable to him, his executors, administrators, or assigns, does not prevent him where he continues to pay the premiums, as against his personal representative, from assigning the policy to his daughter, where it does not appear that the policy was ever turned over to, or claimed by, the assignee, and he does not make any objection to such assignment.

And Pace v. Pace, 19 Fla. 438, holds that the assignee in bankruptcy of one having a policy on his life for the benefit of his estate has no interest in the policy, as the insured was not the beneficiary.

And *Re* Learmouth, 14 Week. Rep. 628, holds that where the assignees in bankruptcy refuse to pay the premiums, and keep up policies, on the life of the bankrupt, and the latter, after obtaining his discharge, pays such premiums, his personal repre-

Ct. Rep. 41; *Cason* v. *Owens*, 100 Ga. 142, 28 S. E. 75; Code, § 2116; *Rawson* v. *Jones*, 52 Ga. 458.

The policies in the present case were originally taken out for the benefit of the estate of the bankrupt, and, but for the fraudulent transfer to his wife, would necessarily have passed to the trustee.

Rawson v. *Jones*, 52 Ga. 458; Biddle, Ins. §§ 70, 274, 277.

Under the act of bankruptcy, §§ 60, 67, 70, the entire assets of the bankrupt pass to the trustee.

Re Grahs, 1 Nat. Bankr. News, 164; *Re Buclow*, 2 Nat. Bankr. News, 26.

All insurance policies pass to the trustee, but in the case of policies having a cash-surrender value the bankrupt "may" redeem such policies by paying the cash-surrender value.

These policies, payable to his estate, belong to the creditors holding claims at the time of his death, under the laws of the state of Georgia.

Rawson v. *Jones*, 52 Ga. 458.

These policies having been transferred to his wife, apparently a few days prior to his voluntary bankruptcy, such transfers are void, and the policies stand as if not transferred.

Bankrupt Act, § 67; *Bean* v. *Brookmire*, 1 Dill. 25, Fed. Cas. No. 1,168.

Irrespective of bankruptcy, Mrs. Morris should not be allowed to collect these policies, because transferred to her by her husband while insolvent and in fraud of his creditors.

Elliott's Appeal, 50 Pa. 81, 88 Am. Dec. 525; *Catchings* v. *Manlove*, 39 Miss. 655; *Central Nat. Bank* v. *Hume*, 128 U. S. 204, 32 L. ed. 375, 9 Sup. Ct. Rep. 41.

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sentatives after his death, instead of the assignees, are entitled to the balance of the proceeds of the policy after paying the amount of a mortgage thereon.

2. *Policy payable to wife of insured.*

Under the bankrupt act of 1898, § 70 (5), *supra*, such a policy forms no part of the assets of the insured on his becoming bankrupt.

Thus, *Re* Steele, 98 Fed. Rep. 78, holds that a policy on one's life, payable to his wife, is her property, and does not pass to the trustee in bankruptcy of the husband.

The same case holds that a policy on one's life, assigned in good faith, before the adoption of such act, to his intended wife, who afterwards became such, does not form part of his assets on becoming bankrupt, and that the trustee has no interest in, or right to, such policy.

And in *Re* Dews, 96 Fed. Rep. 181, the court held that the bankrupt was not necessarily guilty of fraudulent concealment of property preventing his discharge, because he did not disclose sums arising from the surrender of policies on his life in which his wife was the beneficiary, where it did not appear that the premiums paid on the policies were out of reasonable proportion to his financial condition at the time they were paid, or that the withdrawal of their amount was such as to justify an inference of fraud. The court in this case, however, stated that the question before it was not whether the creditors had an equitable right to any portion of the fund.

Under the bankrupt act of 1867, which excepted from the operations of the bankruptcy proceedings property exempted from levy and sale under the laws of the state, and the laws of Pennsylvania, in which state the bankrupt resided, an insurance policy in favor of the wife of the insured, payable on his death, taken out while he was solvent, the premiums on which he continued to pay after his insolvency, was held in Bennett's Case, 6 Phila. 472, Fed. Cas. No. 1,315, to be exempt, and not to pass to his assignee in bankruptcy.

In Belt v. Brooklyn L. Ins. Co. 12 Mo. App. 169, which was an action by the beneficiary in a policy on her husband's life to compel the insurance company to issue to her a paid-up policy, in which the claim was made that the assignee in bankruptcy of the husband was the proper party to bring the suit, the court said there was no evidence of his insolvency when the premium was paid, the last of which was more than two years before the assignment in bankruptcy, and that it would be giving a new interpretation to the bankrupt law to hold that it reached back so long a time and seized on a policy which the bankrupt had, for six years before, kept in force for his wife's benefit; but that it was sufficient to say that, as the policy was by its terms in favor of the wife, she was prima facie the beneficial owner, and if the assignee had any interest he could enforce it in the paid-up policy after it was obtained.

Many of the states have provided by statute that a policy payable to the wife of the insured shall be exempt from the claim of the husband's creditors, except as to the excess of the annual premiums over a specified amount; and in cases of this kind it has been held that the creditors might, during the lifetime of the insured, obtain relief where excessive premiums have been paid.

Thus, in Stokes v. Amerman, 121 N. Y. 337, 24 N. E. 819, a wife took out a policy on her husband's life, payable at his death to her if living, if not to their children, if any, otherwise to the husband's executors, administrators, or assigns, the amount of the annual premiums exceeding $500. N. Y. Laws 1840, chap. 80, as amended by Laws 1870, chap. 277, authorizes a married woman with her husband's consent to cause his life to be insured for her benefit, and entitles her to the insurance money if living at the maturity of the policy free from the claims of his creditors, provided that when the annual premiums paid from his funds exceed $500 such exemption shall not apply to the excess, but that such excess shall inure to the benefit of his creditors. The court held that the creditors of the husband might maintain an action before the husband's death to have his interest as a judgment creditor in the policy ascertained and declared, and to enjoin the husband and wife and their children from transferring the policy except in subordination to his rights, no decision being made as to his right to realize anything on the policy before the husband's death.

Masten v. Amerman, 51 Hun, 244, 4 N. Y. Supp. 681, Reversing 20 Abb. N. C. 443, holds, however, that a receiver in supplementary proceedings cannot maintain such an action, as he is vested only with such rights as the judgment debtor himself had at the commencement of the supplementary proceedings. This case also seems to hold that the interest secured by the policy was at best so contingent that no relief could have been had if the judgment creditor himself had brought the action.

And Baron v. Brummer, 100 N. Y. 372, 3 N. E. 474, holds that an insurance policy in favor

There is nothing in the contention that one of the policies was surrendered, and another issued in lieu thereof, payable direct to Mrs. Morris, because this was the form adopted by their company in case of transfers.

Cason v. *Owens*, 100 Ga. 142, 28 S. E. 75.

It is a fraud on creditors for a person while insolvent to divert his money into policies payable to anybody other than creditors.

Hubbard v. *Turner*, 93 Ga. 752, 30 L. R. A. 593, 20 S. E. 640.

Our Georgia law disposes of this fund, and gives it to the creditors and heirs at law.

Rawson v. *Jones*, 52 Ga. 458.

The New York statute attempts to dispose of the same fund, conflicting exactly with our Georgia law, in which event, of course, Georgia law will prevail.

Birdseye v. *Underhill*, 82 Ga. 143, *sub nom.* *Birdseye* v. *Baker*, 2 L. R. A. 99, 7 S. E. 863; *Miller* v. *Kernaghan*, 56 Ga. 157; *Mason* v. *Stricker*, 37 Ga. 262; Story, Confl. L. § 23.

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

This was a petition filed by Harry Dodd, trustee of the estate of John F. Morris, bankrupt, against his widow, Mrs. V. A. Morris, the Mutual Reserve Fund Life Association of New York, and the Northwestern Mutual Life Insurance Company, in which it was sought to enjoin Mrs. Morris from collecting, and the two insurance companies from paying to her, the amounts of insurance policies issued by the defendant insurance companies upon the life of the bankrupt. The Northwestern Company paid the money due upon the policy issued by it into the registry of the court, to await the final decree of the court. Mrs. Morris and the other insurance

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of the wife of the insured cannot during his lifetime be reached by the creditors of both husband and wife by means of a creditors' bill and receivership, where it does not appear that the husband paid the premiums, and it does appear that no premiums exceeding $500 were paid by anyone after contracting the debt on which the creditors' bill was based.

Re Bear, 11 Nat. Bankr. Reg. 46, Fed. Cas. No. 1,178, holds that a policy taken out on one's life in favor of his wife while he is insolvent, if reasonable in amount when considered in connection with his estate and liabilities, belongs to the wife, and is not subject to be surrendered to the husband's assignee in bankruptcy, but that the latter is entitled to recover from the wife, when the policy is paid, the amount paid by the husband while insolvent, and that such claim, when ascertained, may be sold by the assignee, and will pass the contingent right to the purchaser.

Holt v. Everall, 34 L. T. N. S. 599, L. R. 2 Ch. Div. 266, 45 L. J. Ch. N. S. 433, 24 Week. Rep. 471, holds that the trustee in bankruptcy of one who had surrendered policies on his own life which had no surrender value, taking in lieu thereof policies payable to his wife, had no interest in such policies, as, under the married women's act, § 10, the creditors of the husband have no interest in a policy taken out for the wife's benefit except to the amount paid out for premiums paid with intent to defraud creditors.

In *Ex parte* Merrett, 7 Morrell, 65, digested in Mews' English Digest, vol. II. col. 404, a policy was taken out on the husband's life with his consent, in the name of his wife, he paying the premiums as remuneration for his wife's assistance in business. He became bankrupt, and at that time the policy had been deposited with other property as collateral security for an advance to him. The trustee in bankruptcy claimed the right to dispose of the policy for the benefit of the creditors, subject to the wife's right of survivorship. The court held that the policy might be allowed to remain in the trustee's possession on an undertaking by him to keep up the premiums until the death of the bankrupt or his wife, and in case the bankrupt died first the wife was not to be called on to repay the premiums paid by the trustee.

3. *Policy assigned or made payable to creditor.*

(a) *In general.*

The assignment of a policy has been held to take away the benefit of a statutory exemption from liability for debts of the insured.

Thus, Wyman v. Gay, 90 Me. 36, 37 Atl. 325, holds that, although, under Me. Rev. Stat. chap. 49, § 94, a life insurance policy is exempt where the annual premium is less than $150, such policy may be recovered by the assignee in insolvency of the insured after its transfer to a creditor in payment of an antecedent debt, as the exemption is personal to the insured, and is waived by the transfer.

Ex parte Hallifax, 2 Mont. D. & De G. 544, holds that a policy on the life of another, deposited with the bankrupt as collateral security, passes to the assignee of the bankrupt, notwithstanding a prior deposit by him as collateral security of several instruments, the policy being included in the memorandum of the deposit, where the policy itself is not deposited, but a mere promise made to deposit it, and it afterwards comes into the hands of the assignee.

In Bozon v. Bolland, Mont. & Bligh, 74, as explained and corrected in Duncan v. Chamberlayne, 11 Sim. 123, a certain person wished to have an insurance on the life of another in which he had an insurable interest, and by mistake his agent took the policy in his own name instead of the principal's. On discovering the mistake a new policy was granted, as a substitute, to the person whose life was insured, and who assigned it in trust to the agent, for the insured, under a specified contingency, which never happened, otherwise for the persons entitled to receive it under the principal, the agent to keep up the policy, which never came into the hands of the insured, who subsequently became bankrupt. The court held that, as the insured never had any interest in the policy, and it never came into his possession, it was not in his order and disposition within the English bankrupt law.

(b) *Necessity of notice of assignment.*

The practice of assigning life insurance policies to secure a loan from the assignee has prevailed to quite an extent in England, and in most of the cases decided there the question has been as to the necessity or sufficiency of the notice of assignment to take the policy out of the order and disposition of the assignor on his becoming bankrupt. The cases hold, practically without exception, that unless notice of some kind has been given the policy will pass to the assignee in bankruptcy, and therefore, of course, that if it had not been assigned it would have constituted part of the assets of the bankrupt.

Ex parte Tennyson, Mont. & Bligh, 67, di-

company answered the petition. Upon the hearing, it appeared that each of the insurance companies had issued a policy upon the life of John F. Morris, payable to his legal representatives; that the one by the Northwestern Company issued in 1890, the date of the insurance of the other not appearing. It further appeared that during the month of April, 1899, Morris surrendered his policy in the Mutual Reserve Fund Life Association, and the association thereupon issued a new policy, upon the same terms as the old, in which new policy Mrs. V. A. Morris, his wife, was the beneficiary, and that during the same month Morris assigned the policy which he held in the Northwestern Company to his wife, the assignment being accepted by the company. Morris's petition in voluntary bankruptcy was filed on the 29th day of the same month. He died in the following October, pending the proceedings in bankruptcy, and immediately after his death Dodd, the trustee of his estate, filed this petition. The contention of the trustee was that the transfers of the policies were made with intent to hinder, delay, or defraud the creditors of the bankrupt, and, having been executed within four months prior to the filing of the petition in bankruptcy, were void, and that the policies vested in the trustee at the time of the adjudication in bankruptcy, as part of the assets of the bankrupt's estate.

Section 67*e* of the bankrupt act of 1898 provides "that all conveyances, transfers, assignments, or encumbrances of his property, or any part thereof, made or given by a person adjudged a bankrupt under the provisions of this act subsequent to the passage of this act and within four months prior to

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gested in Mews' English Digest, vol. 2, col. 330, and *Re* Armstrong, Craw. & D. (Ir.) 37, hold *that the assignment* of a policy without notice to the office of the insurance company does not take it out of the order and disposition of the assignor so as to prevent it from passing to his assignee in bankruptcy, where notice of the assignment was not given to the company.

And Williams v. Thorp, 2 Sim. 257, holds that notice to the company is necessary, although the company does not require such notice to be given, and it is not customary to give it.

And *Ex parte* Colvill, Montagu Bankr. Cas. 110, holds that an assignment of a policy does not take it out of the *order and disposition of* the bankrupt within the statute of 6 Geo. IV. chap. 16, § 72, where notice of the assignment is not given to the office until long after the issuing of the commission in bankruptcy.

Ex parte Stevens, 4 Deacon & C. 117, holds that the burden of proving that notice of a deposit of a *life* policy by way of equitable mortgage was not given to the insurance company before the act of bankruptcy of the mortgagor rests upon the assignees in bankruptcy.

The following cases, in which the insurance companies were mutual ones, the assured participating in the profits, hold that the mere failure to give notice of the assignment to the company is not sufficient evidence that the bankrupt was the reputed owner of the policies, and that they were in his order and disposition: *Ex parte* Cooper, 2 Mont. D. & De G. 1; *Ex parte* Smith, 2 Mont. D. & De G. 213; *Ex parte* Heathcote, 2 Mont. D. & De G. 714, 6 Jur. 1001; *Ex parte* Rose, 2 Mont. D. & De G. 131.

The last case, that of *Ex parte* Rose, 2 Mont. D. & De G. 131, also holds that notice of the assignment if material would be presumed, as the company was a mutual one.

These cases have, however, been overruled by the later cases, which hold that notice of the assignment is as essential where the company in a mutual one, as in other cases.

Thus, *Re* Bromley, 13 Sim. 475, holds that express notice of a deposit of a life insurance policy by way of equitable mortgage is necessary, although the company is a mutual one, as the notice incident to the deposit resulting from the membership of the insured in the company is insufficient.

And *Ex parte* Pott, 12 L. J. Bankr. N. S. 33, 7 Jur. 159, known as *Ex parte* Arkwright, 3 Mont. D. & De G. 129, is to the same effect.

Duncan v. Chamberlayne, 11 Sim. 123, 4 Jur. 819, 10 L. J. Ch. N. S. 307, holds that notice of an assignment of a policy is not required where by the constitution of the insurance company all the assured are partners in the company. This case was, however, overruled in Thompson v. Speirs, 13 Sim. 469, which holds that an assignment by an insured of his own policy is not notice to the company because he is a partner in the company.

And *Ex parte* Barnett, 1 De G. 194, *holds* that an insurance policy on the life of another, deposited by the one effecting it with his brokers as security for his individual debt, of which notice is given to the company, is removed from his order and disposition so as not to pass to his assignee in bankruptcy, although notice is not given of a subsequent change by which the policy is made to stand as security for a firm subsequently formed of which he is a member.

The same case holds that where a mortgagee of a policy on the life of another deposits it as security, and gives notice of such deposit to the insurance company, it removes the policy from his order and disposition, although he gives no notice of the deposit to his mortgagor.

And *Ex parte* Waithman, 4 Deacon & C. 412, holds that where the assignor is a director, and one of the firm to which the policy is assigned is an *auditor of the insurance company*, no further notice of the assignment is required.

Ex parte Patch, 12 L. J. Bankr. N. S. 44, 7 Jur. 829, holds that notice of the assignment is necessary, although one of the intermediate assignees is an agent of the company, and there is an indorsement on the policy that the company does not require notice.

And *Ex parte* Price, 13 L. J. Bankr. N. S. 15, 3 Mont. D. & De G. 586, holds that notice is necessary to an insurance company in which the insured does not participate in the profits, although the one who negotiated the transaction is the solicitor of the bankrupt's debtor on whose life the policy assigned was given.

And *Re* Henessy, Ir. 5 Eq. Rep. 259, 1 Con. & L. 559, 2 Dru. & W. 555, holds that notice to the insurance company of an assignment by a subagent as security is necessary where the policy was issued to him from the head office, *and local agents had* been directed not to transmit notices of assignments.

But Gale v. Lewis, 6 Q. B. 730, 16 L. J. Q. B. N. S. 119, 11 Jur. 780, holds that no further notice of the assignment is required, where one agrees to loan money to another on the security of a policy to be taken out by him, and directs his attorney to procure the policy, and the latter takes out a policy in a company of which he is agent, with authority to receive

the filing of the petition, with the intent and purpose on his part to hinder, delay, or defraud his creditors, or any of them, shall be null and void as against the creditors of such debtor, except as to purchasers in good faith and for a present fair consideration; and all property of the debtor conveyed," etc., "shall . . . be and remain a part of the assets and estate of the bankrupt and shall pass to his said trustee, whose duty it shall be to recover and reclaim the same by legal proceedings or otherwise for the benefit of the creditors." Section 70*a* of the act provides: "The trustee of the estate of a bankrupt, upon his appointment and qualification . . . shall . . . be vested *by operation of law with the title of the* bankrupt, as of the date he was adjudged a bankrupt. . . . to all . . . (5) property which, prior to the filing of the petition, he could by any means have transferred, or which might have been levied upon and sold under judicial process against him: provided, that when any bankrupt shall have any insurance policy which has a cash-surrender value payable to himself, his estate or personal representatives, he may, within thirty days after the cash-surrender value has been ascertained and stated to the trustee by the company issuing the same, pay or secure to the trustee the sum so ascertained and stated, and continue to hold, own, and carry such policy free from the claims of the creditors participating in the distribution of his estate under the bankruptcy proceedings, otherwise the policy shall pass to the trustee as assets." *Under the view we take of* the question presented for determination, it is immaterial that the policies of insurance were transferred by the bankrupt to his wife

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notices of assignment, and delivers it to the lender without its going into the hands of the borrower, although such agent did not mention to the head office of the company that the lender was the beneficial owner of the policy.

Re Russell, Craw. & D. (Ir.) 27, holds that notice of the assignment to the company is necessary to take the policy out of the order *and disposition of the insured, where the policy* was effected by the bankrupt himself; but, where it was effected by another and assigned to him before his bankruptcy and by him reassigned, notice of the assignment by him is not required.

And *Ex parte* Wood, 3 Mont. D. & De G. 315, 12 L. J. Bankr. N. S. 42, 7 Jur. 521, holds that a policy on the life of another, deposited by the bankrupt who was the mortgagee, remains in his order and disposition, although no notice of the mortgage to him was given to the company, where notice of the deposit by him was not given either to the company or his mortgagor.

Gibson v. Overbury, 7 Mees. & W. 555, holds that notice is not required where the policy, instead of being assigned, is deposited by the bankrupt with another as a mere lien to prevent the bankrupt from receiving the money thereon without notice to the one with whom it *is deposited, and that the policy cannot be re*covered by the assignees in bankruptcy in an action of trover.

This case is distinguished in Green v. Ingham, 36 L. J. C. P. N. S. 236, L. R. 2 C. P. 525, 16 L. T. N. S. 455, 15 Week. Rep. 841, which holds that notice is required where a policy is sold as security for an existing debt with the intention to pass the fund represented by the policy and the equitable right to recover thereon, and on condition that the sale shall be void if the debt is repaid, although the transferee thereafter pays the premiums on the policy.

Ex parte Ibbetson, L. R. 8 Ch. Div. 519, 39 L. T. N. S. 1, 26 Week. Rep. 843, holds that a life insurance policy is a "thing in action" excepted from the reputed ownership clause within the English bankruptcy act of 1869, § 15, subd. 5, providing that things in action other than debts due the bankrupt in the course of his trade or business shall not be deemed goods or chattels within the meaning of such clause, and that, in consequence, the second mortgagee of such policy is entitled thereto as against the trustee in bankruptcy, *although no notice of the second mortgage* was given to the first mortgagee or to the insurance company until after the appointment of such trustee.

(c) *Sufficiency of notice of assignment.*

Very slight notice of the assignment is sufficient to remove the policy from the order and disposition of the bankrupt.

A few cases (Duncan v. Chamberlayne, 11 Sim. 123, 4 Jur. 819, 10 L. J. Ch. N. S. 307; *Ex parte* Cooper, 2 Mont. D. & De G. 1; *Ex parte* Smith, 2 Mont. D. & De G. 213, 5 Jur. 874; *Ex parte* Heathcote, 2 Mont. D. & De G. 711-714, 6 Jur. 1001: *Ex parte* Rose, 2 Mont. D. & De G. 131) held that the notice of the assignor was sufficient where the company was a mutual one in which the assignor participated in the profits. These cases however, have been overruled by the later cases, such as Thompson v. Speirs, 13 Sim. 469, 14 L. J. Ch. N. S. 453, 9 Jur. 933, which holds that the assignment by the insured of his own policy is not notice to the company merely because he is a partner in the company.

Re Bromley, 13 Sim. 475, 9 Jur. 934, note, also holds that express notice to the company of a deposit of the policy by way of equitable mortgage is necessary, although the policy was effected with a mutual insurance company, as the notice incident to the deposit resulting from the membership of the insured in the company is sufficient.

And *Ex parte* Patch, 12 L. J. Bankr. N. S. 44, 7 Jur. 820, holds that the mere fact that one of the intermediate assignees of an insurance policy is an agent of the company is insufficient to take the policy out of the order *and disposition of the assignor on his subse*quently becoming bankrupt.

And *Ex parte* Price, 3 Mont. D. & De G. 586, 13 L. J. Bankr. N. S. 15, holds that the deposit of a policy on the life of a debtor of the depositor in a company in which the assured does not participate in the profits is insufficient to take the policy out of the order and disposition of the one depositing it, where there was no other notice of the deposit than that of the solicitor of the depositor's debtor who negotiated the transaction.

Gale v. Lewis, 6 Q. B. 730, 16 L. J. Q. B. N. S. 113, 11 Jur. 780, however, holds that there is sufficient notice of the assignment where one agrees to loan money to another on the security of a policy to be taken out by him, and directs his attorney to procure the policy, and the latter takes out a policy in a company of which he is agent, and delivers it to the lender without its going into the hands of the borrower, although such agent did not mention to the head office of the company

within four months prior to the filing of his petition in bankruptcy. Upon the hearing, there was no evidence submitted for the trustee that either of the policies had any cash-surrender value, either at the time of the transfer or at the time of the filing of the petition in bankruptcy, but there was much evidence in behalf of the defendants that the policies had no such value at either of the times indicated. If the policies, then, had no cash-surrender value, we are of opinion that they would not vest in the trustee, as assets of the bankrupt's estate, even if no changes had been made in them, and they had, to the date of his death, remained payable to his legal representatives. The exact point was decided in *Re Buelow*, 98 Fed. Rep. 86, where it was held: "A policy of insurance on the life of a bankrupt, which has no cash-surrender value, and no value for any purpose except the contingency of its becoming valuable at the death of the bankrupt if the premiums are kept paid, does not vest in the trustee as assets of the estate;" and the court directed the trustee to deliver the policy to the petitioners, the bankrupt and his wife. District Judge Shiras, in *Re Steele*, 98 Fed. Rep. 78, while holding that where a bankrupt held a policy payable to himself, his heirs or legal representatives, the surrender value thereof would be part of the assets of his estate in bankruptcy, very clearly intimated that this would not be so if the policy had no cash-surrender value. *To the same effect, see Re Lange*, 91 Fed. Rep. 361. In the case of *Ætna Nat. Bank* v. *United States L. Ins. Co.* 24 Fed. Rep. 770, it was held that a bill in equity could be maintained by creditors of a deceased debtor to reach premiums paid to a life insurance company in fraud of

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that the lender was the beneficial owner of the policy.

But *Re* Henessy, Ir. 5 Eq. Rep. 259, 1 Con. & L. 559, 2 Dru. & W. 555, holds that where a subagent of an insurance company takes out a policy on his own life, and assigns it as security, it remains in his order and disposition so as to pass to an assignee in bankruptcy subsequently appointed, where notice of the assignment was given to him alone, and the policy was issued to him from the head office, and local agents had been instructed not to transmit notices of assignments. The court also intimates very strongly that notice to him would have been insufficient, even if the policy had been issued to him at the place where he acted as agent.

Ex parte Waithman, 4 Deacon & C. 412, holds *that where the assignor is a director, and one* of the firm to which the policy is assigned is an auditor, of the insurance company, their notice of the assignment is sufficient.

In Thompson v. Tomkins, 2 Drew. & S. 8, 8 Jur. N. S. 185, 6 L. T. N. S. 305, 10 Week. Rep. 310, a life policy was taken out to secure a debt from the insured to the beneficiary. The insured afterwards mortgaged it to a third person, who gave notice to the executors of the beneficiary and to the insurance office. He afterwards deposited it by way of a submortgage, the submortgagee giving notice to the executors, but not to the office. Such notice was held insufficient to take the policy out of the order and disposition of the one depositing it.

In *Re* Langmead, 20 Beav. 20, a life insurance policy was assigned to a firm. On the dissolution of the firm the retiring partner agreed to assign it to the continuing partner, who assigned it as security, of which assignment notice was given to the company, after which the continuing partner became bankrupt, and the court held that the policy had been taken out of his order and disposition.

And *Ex parte* Barnett, 1 De G. 194, holds that an insurance policy on the life of another, deposited by the one effecting it with his brokers as security for his individual debt, of which notice is given to the company, is removed from his order and disposition so as not to pass to his assignee in bankruptcy, although notice is not given of a subsequent change by which the policy is made to stand as security for a firm subsequently formed of which he is a member.

This case also holds that where the mortgagee of a policy on the life of another deposits it as security, and gives notice of such deposit to the insurance company, it removes the policy from his order and disposition, though he gives no notice of the deposit to his mortgagor.

Although slight notice of the assignment is sufficient, a mere verbal remark by one who has deposited a policy on his life as security, to the secretary of the company, that he has made such deposit, is insufficient. Edwards v. Martin, L. R. 1 Eq. 121, 13 L. T. N. S. 236, 14 Week. Rep. 25, 35 L. J. Ch. N. S. 186.

And *Ex parte* Carbis, 4 Deacon & C. 354, holds that a statement that the policy has been assigned, made in a loose conversation between the agent of the assignee and a clerk of the insurance company while the former is at the office of the company to pay a premium on the policy, is insufficient notice of the assignment.

In *Re* Young, Ir. L. R. 23 Eq. 372, a policy on his own life was assigned by the manager of a branch insurance office as security, and no notice of the assignment other than a very indefinite verbal one, giving neither the date nor purport of the assignment, was given to the insurance company. The assignor was afterwards adjudicated a bankrupt, and the assignees in bankruptcy gave a formal written notice of such fact to the company before any further notice was received from the assignee of the policy. The court held that the assignees in bankruptcy were entitled to the policy under the statute of 30 and 31 Vict. chap. 144, § 3, providing *that no assignment of a policy shall confer the* right to sue until a written notice of the date and purport of the assignment is given to the company, and that the date on which the notice is received shall regulate the priority of all claims under any assignment.

And West v. Reid, 2 Hare, 249, 12 L. J. Ch. N. S. 245, 7 Jur. 147, holds that there is not sufficient evidence of notice to the insurance company of the assignment of a policy from a mere memorandum written on the margin of the books of the company opposite the declaration of the insured "Letters to be sent to" specified persons, *nor by the fact that the premi*ums were all paid by the assignee through such third persons, where no intimation was given that the payments were not made for the insured.

On the other hand, a notice to the effect that the policy had been assigned, without stating the name of the assignee, was held sufficient in *Re* Russell's Policy Trusts, L. R. 15 Eq. 26, 27 L. T. N. S. 706, 21 Week. Rep. 97.

And in Alletson v. Chichester, L. R. 10 C. P. 319, 44 L. J. C. P. N. S. 153, 32 L. T. N. S. 151, 23 Week. Rep. 393, a statement by the attorney for the assignee to the secretary or actuary of

them, but that they could have no claim upon the insurance, even in such a case, beyond the amount of the premiums and the interest thereon. Under the bankruptcy act of 1867, in *Re McKinney*, 15 Fed. Rep. 535, it was held: "An assignee in bankruptcy has no insurable interest in the life of a bankrupt, at least after his discharge. Upon a policy on the life of the bankrupt, payable at his death to his executors, administrators, or assigns, with an equal premium payable annually during the bankrupt's life, the only beneficial interest which passes to the assignee in bankruptcy is its surrender value or net reserve at the time of the bankruptcy. Beyond that interest the policy, so far as respects any future insurance under it, would be a burden rather than a benefit, which the assignee is not authorized to continue, and the assignee takes the legal title to the policy for the purpose of making the surrender value or net reserve available to the estate." In *Holt* v. *Everall*, an English case, decided by the court of appeal, under the British bankruptcy act of 1869, reported in 34 L. T. N. S. 599, it appeared that in 1870 a trader effected policies of insurance on his own life. In the following year, wishing his wife might have the benefit of the policies, under the married woman's act, he surrendered them to the insurance company, and received in substitution therefor policies at the same premiums, payable on the same day, and entitled to the same privileges, as the former, and which provided that the sums assured should be paid to the wife. Within two years from the date of the substitute policies the husband liquidated, dying before the discharge. The trustee claimed the insurance. It was held that, as

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the company at the time of paying a premium, that it had been assigned to his client, was held sufficient, the statute not at that time requiring the notice to be in writing.

And Edwards v. Scott, 1 Mann. & G. 962, 2 Scott N. R. 266, 1 Drink. 6, 10 L. J. C. P. N. S. 11, 4 Jur. 1062, holds that the notice of the assignment is sufficient to take the question to the jury where the fact of the assignment was mentioned at several meetings of the assignor's creditors and to a clerk at the insurance office on payment of a premium by the assignee, although the insurance company required written notice of the transfer of a policy.

And *Ex parte* Stright, 2 Deacon & C. 314, Montagu, Bankr. Cas. 502, 2 L. J. Bankr. N. S. 12, holds that a letter from the assignee to the secretary of the insurance office, stating that he is the holder of the policies, and asking what the office will give for their delivery for cancelation, is sufficient.

In *Re* Hickey, Ir. Rep. 10 Eq. 117, the holder of a policy on his own life agreed to assign it to his father to secure a debt due to him, and then assigned it to a third person by way of equitable mortgage to secure a present loan and future advances. All the parties resided in Ireland, and the policy required notice of an assignment to be sent to the head office in London. The mortgagee prepared a notice of the assignment to the father of the insured, at whose request he signed and posted it in Ireland to the company's secretary in London. The insured was afterwards adjudicated a bankrupt and died, and the assignee in bankruptcy claimed the policy as being in his order and disposition. Ball, Lord Chancellor, held that as the notice was duly posted it might be presumed to have reached its destination. And Christian, Lord J. App., held that the mere posting was sufficient to take the policy out of the bankrupt's order and disposition "by the consent and permission of the owner" within the Irish bankrupt and insolvency act of 1857, § 313, as such posting clearly indicated an intent not to let it remain in the bankrupt's possession.

(d) *Time of notice of assignment.*

Notice of the assignment must be given before the bankruptcy to be effective. Thus, *Ex parte* Caldwell, L. R. 13 Eq. 188, 41 L. J. Bankr. N. S. 55, 20 Week. Rep. 363, holds that a life insurance policy handed over by the insured to the trustees under a marriage settlement before his bankruptcy remains in his order and disposition with the consent of the true owner, where no notice is given to the company until after the bankruptcy, although such notice is given before the assignee in bankruptcy gives any notice.

And *Re* Webb, 36 L. J. Ch. N. S. 341, 16 L. T. N. S. 89, 15 Week. Rep. 529, holds that where the mortgagor of a life insurance policy leaves it off his balance sheet, and continues to pay the premiums, and the assignee in bankruptcy knows nothing of the policy, such assignee, instead of the mortgagee, is entitled to the policy or its proceeds, where the mortgagee gave no notice to the company until after the bankrupt's death, although the assignee in bankruptcy gave no notice, and the order for the sale of the policy was not made until after the mortgagee had given notice.

Re Russell's Policy Trusts, L. R. 15 Eq. 26, 27 L. T. N. S. 706, 21 Week. Rep. 97, on the contrary, holds that where notice of the assignment of the policy is given to the company before it receives notice of the bankruptcy, although after the bankruptcy actually occurs, the notice is sufficient.

And *Re* Styan, 1 Phill. Ch. 105, 6 Jur. 158, 2 Mont. D. & De G. 219, 11 L. J. Ch. N. S. 127, Aff'g 2 Mont. D. & De G. 213, 10 L. J. Bankr. N. S. 79, 5 Jur. 874, holds that where a policy is assigned before the act of bankruptcy, and notice thereof given to the company after such act, but without notice of it and before the fiat is issued, the policy does not pass, under 2 & 3 Vict. chap. 29, providing that any transaction with any bankrupt before the fiat issues shall be valid notwithstanding a prior act of bankruptcy, if the person so dealing with him had no notice at the time of any act of bankruptcy.

(e) *Extent of creditor's interest.*

In several cases in this subdivision the rights to the proceeds of the policy after the death of the insured are considered, but in all such cases rights therein had been acquired during his lifetime.

The amount paid by the assignee of the policy for premiums has in some cases been allowed, the balance going to the assignee in bankruptcy. Thus, in *Re* Armstrong, 1 Craw. & D. (Ir.) 37, the assignee in bankruptcy on having the policy adjudicated to him undertook to repay all sums paid by the assignee of the policy as premiums after the bankruptcy occurred.

And Schondler v. Wace, 1 Campb. 487, halds that where a bankrupt fails to deliver up a policy on his life, or discover it to the commissioners or his assignees, and afterwards assigns

the policies of 1870 had no surrender value, the transaction of the following year was not a settlement of property, under the bankruptcy act of 1869, and that the widow was entitled to the policy money. In speaking of the substitution of one policy for another, James, L. J., in his opinion said: "If it could be made out that this was a device to avoid the 91st section of the bankruptcy act of 1869, and that there was any actual property—anything which the court could construe as of value—settled at that time, then probably the court would say: We cannot allow a device to be resorted to for the purpose of making that thing appear to be not a settlement which was in truth a settlement. . . . In that point of view it is important to see whether there was any actual property—anything that could be called property—at the time when the husband effected the policies in question. If the husband at that time gave up anything of real value as part of the consideration for the new policies, there might be some question; but I am satisfied that that which was given up was not of the slightest value whatever, that there was nothing taken away from the creditors in point of substance, and that the transaction, as far as the creditors were concerned, was, in substance, exactly the same as if the policies in 1871 had been made without any reference whatever to the existing policies of 1870, which the husband might have given up at any mo-

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it to one who pays up arrears on the premiums, nonpayment of which would soon have caused it to be forfeited, and thereafter assigns it for value, after which the bankrupt dies, the assignees in bankruptcy are entitled to recover the amount due on the policy, deducting the amount paid out by the assignees of the policy for premiums.

And in West v. Reid, 2 Hare, 249, 12 L. J. Ch. N. S. 245, 7 Jur. 147, the assignees in bankruptcy were held to be entitled to the proceeds of the policy after repaying with interest the amount of *premiums paid by the assignee* of the policy.

In some cases the assignee of the policy has been allowed the full amount of his claim, the assignee in bankruptcy taking the balance of the interest in the policy.

Thus, *Re* Storie, 1 Giff. 94, 28 L. J. Ch. N. S. 888, 5 Jur. N. S. 1153, holds that where a policy was taken out as collateral security for a loan to the insured, the premiums being paid out of the income from the life estate of the debtor, and the policy being taken out in the name of the creditor, a surplus remaining after payment of the debt in full from the proceeds of the policy belongs to the assignee in insolvency of the debtor appointed during his lifetime, where he mentioned the policy in his schedule as security for the debt secured thereby.

And *Re* Russell's Policy Trusts, L. R. 15 Eq. 26, 27 L. T. N. S. 706, 21 Week. Rep. 97, holds that the assignee of the policy is entitled to prove for the full amount of his debt, and that subject to such encumbrance the assignees in bankruptcy are entitled to the proceeds of the policy.

In Desborough v. Harris, 4 Week. Rep. 2, 3 Eq. Rep. 1058, 1 Jur. N. S. 986, 5 De G. M. & G. 439, one having a policy on the life of another assigned it as security for a loan, notice being given to the company. He afterwards took advantage of the insolvent debtor's act, and his property was transferred to a provisional assignee. On the death of the insured the provisional assignee declined to consent to payment to the assignee of the policy, but offered no opposition. The insurance company filed a bill of interpleader, and the court, on refusing it because there was no conflict, stated that the insolvent had no interest in the policy, the right of redemption having passed to the provisional assignee, and that, as the assignment of the policy was not denied, the latter had a claim only after payment of the claim of the assignee of the policy.

Re Weil, 2 Nat. Bankr. News, 295, holds that where a life policy was turned over as security for the indorsement of a note for the insured while insolvent, and he afterwards became bankrupt, and the policy was turned over to the trustee in bankruptcy, who surrendered it, receiving the cash-surrender value exceeding the amount of the note, the indorser was entitled, where the note had been proved by the holder, to have *such note paid in full* consideration of his claim to the policy.

In Heyman v. Dubois, L. R. 13 Eq. 158, 41 L. J. Ch. N. S. 224, 25 L. T. N. S. 558, a person borrowed several sums securing the same by mortgaging different life policies, and the court held that a surety for repayment of one of such sums was entitled, as against the assignee in bankruptcy of the borrower, to have the several policies marshaled so as to obtain from the policy as to which he was surety the full amount that he was compelled to pay as such, and also held that a voluntary payment to him by the debtor's wife from her separate estate to reimburse him for the loss he had sustained as surety was not such payment as would affect his right to repayment from the policies.

In some cases the assignee of the policy has been allowed or required to set a value on the policy and prove for the balance of his claim, *in which case it has been held, in England*, that all further interest in the policy passed to the assignee in bankruptcy.

Thus, in *Ex parte* King, L. R. 20 Eq. 273, 44 L. J. Bankr. N. S. 92, 32 L. T. 503, 23 Week. Rep. 681, the assignee of a policy on the life of one who filed a liquidation petition under which a trustee of his property was appointed, valued his property at £200, and proved for the balance of his debt. The insured soon after died, and the assignee claimed the right to apply the entire amount of the policy on his debt. The English bankrupt act of 1869, § 40, provides that a creditor holding a security may give it up and prove the whole debt, or may receive a dividend after giving credit for the value of the security. Bankruptcy rule 99 provides that any secured creditor may state in his proof the value at which he assesses the security, and shall be deemed a creditor for the balance. Rule 100 requires any secured creditor so proving to pay over to the trustee the excess produced by his security beyond the assessed value, and authorizes the trustee to redeem the security on payment of the assessed value at any time before the creditor realizes their value. The court held that the creditor must turn over to the trustee in bankruptcy all above the £200 for which he valued the policy, although he intended to keep it up, and the trustee did not object to the assessment or offer to redeem before the death of the insured.

And in Bolton v. Ferro, L. R. 14 Ch. Div. 171, 49 L. J. Ch. N. S. 569, 42 L. T. N. S. 529, 28 Week. Rep. 578, the debtor executed a composition deed by which he and a surety agreed

ment he liked, or forfeited, or done anything he liked with. Therefore there is nothing substantial arising from the fact that the policies of 1871 were in exchange for the policies of 1870." Mellish, L. J., in his concurring opinion, used the following language: "I agree with the lord justice . . . that if the surrendered policy really was in substance worth nothing, if it was a policy which an insolvent man would naturally allow to drop, it is very difficult to see what object an insolvent trader, knowing that he is going to become a bankrupt, has in keeping up a policy on his life, and paying the premiums, knowing that the money will go for the benefit of his creditors, or perhaps not for their benefit, because, if the policy were such as this was, which had only been effected for a single year, it does no benefit to the creditors. What a trustee in bankruptcy does, if such a policy comes into his hands, is to see if he can get anything from the insurance office, and all the creditors are deprived of is the surrender value of the policy; and, if there is no surrender value, we may consider that the new policy effected instead of it comes within the protection of the act [the married women's property act]." In *Exchange Bank* v. *Loh*, 104 Ga. 446, 44 L. R. A. 372, 31 S. E. 459, this court held that the only insurable interest a creditor has in the life of his debtor is for the purpose of indemnifying himself against the loss of his debt, and that such interest cannot exceed

to pay a composition of 10 shillings in the pound on obtaining a release in full, the deed providing that every secured creditor should have the full benefit of his security and share in the composition for the balance. A creditor holding a policy on the life of the debtor valued it at £16, and shared in the composition for the balance. On the death of the insured after obtaining his release the creditor claimed a right in the proceeds for the full amount unpaid on his claim together with premiums paid and interest. The court, however, held that he was entitled only to the £16 with interest and the premiums paid with interest, the estate being entitled to the balance.

But the assignee of the policy may be permitted to amend his valuation or withdraw his proof at any time before the assignee in bankruptcy has paid him the amount at which he valued the policy.

Thus, in *Re* Newton [1896] 2 Q. B. 403, 65 L. J. Q. B. N. S. 686, 75 L. T. N. S. 144, the assignee of a life insurance policy for £500 assessed its value at £10 before the trustee under a receiving order of the assignor. The insured soon after died, and the trustee served a notice on the assignee that he elected to redeem the policy, and tendered the £10, which the assignee refused to accept, claiming the right to amend his valuation under the bankrupt act of 1883, schedule 2, rule 11, requiring a secured creditor before ranking for dividend to state in his proof the value at which he assesses his security, and receive a dividend on the balance only, rule 12 (a) authorizing the trustee to redeem "at any time" a security so valued on payment of its assessed value to the creditor, and rule 13, authorizing the creditor to amend his valuation "at any time" on showing that the security has increased in value. The court held that he had the right to amend, as the tender by the trustee was not the equivalent of payment.

And in *Ex parte* Norris, L. R. 17 Q. B. Div. 728, the assignee of the policy estimated its value at a specified amount and proved for the balance. The trustee in bankruptcy two days later wrote to the assignee's solicitor that it was his intention to redeem the policy. The bankrupt died a few days later, and the assignee of the policy asked to be allowed to withdraw his proof. The court held that, under sched. 2, rules 12 (a) and 13, the assignee had the right to withdraw, as the trustee had not paid the assessed value of the policy.

But in this country the assignee of the policy has been held to retain an interest in the policy for the full amount of his claim payable on the death of the insured, although he has set a value on the policy and proved for the balance of his claim.

Thus, *Re* Newland, 6 Ben. 342, Fed. Cas. No. 10,170, 7 Nat. Bankr. Reg. 477, holds that an assignee in bankruptcy cannot require one for whose benefit the bankrupt has taken out a policy on his life as collateral security for a debt for the amount of the policy to withdraw her proof and look only to the policy, or to surrender the policy and take a dividend on her entire claim except as to an amount paid thereon by the bankrupt; but the creditor may retain the policy and prove for all her claim except the cash-surrender value, amounting to much less than the premiums paid thereon.

On a subsequent hearing in this case, *Re* Newland, 7 Ben. 63, 9 Nat. Bankr. Reg. 62, Fed. Cas. No. 10,171, the creditor, after deducting the cash-surrender value of the policy and receiving a dividend of 20 per cent from the assignee in bankruptcy on the balance of her claim, continued to pay the premiums on the policy until the death of the bankrupt. She then claimed the right to retain the dividend and recover the full amount of the policy. The court held that the creditor was entitled to the balance of her claim remaining unpaid with interest and the amounts paid for premiums with interest, and that the balance, if any, would go to the assignee in bankruptcy, as § 22 of the bankrupt act provided that a proof of debt must set forth all securities, and authorized a re-examination of all claims and proofs of loss at any time.

4. Policy assigned to other than creditors.

Where the policy has been assigned in good faith to the bankrupt's wife while solvent no interest passes to his trustee or assignee in bankruptcy, but where it has been transferred in fraud of his creditors it may be reached in a proper action, though it would seem that it cannot be by proceedings supplementary to execution.

Thus, *Re* Steele, 98 Fed. Rep. 78, holds that a policy on one's life, assigned in good faith before the adoption of the bankrupt act of 1898 to his intended wife, who afterwards became such, does not form part of his assets on becoming bankrupt, and the trustee in bankruptcy has no interest in or right thereto.

Leonard v. Clinton, 26 Hun, 289, holds that a policy payable to the personal representatives of the insured, and by him assigned to his wife, and by her transferred to her children in fraud of her creditors, is subject to the right of one of such creditors to bring an action to set aside the transfer and recover the surrender value of the policy; and such action may be maintained although there is an assignee for creditors of the wife.

Metcalf v. Del Valle, 64 Hun, 245, 19 N. Y. Supp. 16, Affirmed in 137 N. Y. 545, 33 N.

in amount that of the indebtedness to be secured. The purpose of the bankruptcy act is to take the property owned by the bankrupt when the petition is filed, and apply it towards the payment of his then existing debts, discharging him in due course from any further liability; his after-acquired property not being subject to such debts. This being true, it is apparent that the creditors represented by the trustee, whose debts cannot continue against the bankrupt, can have no insurable interest in his life for the purpose of indemnifying themselves against loss. In view, therefore, of the authorities cited and the language of the act itself, it seems that a policy of insurance on the life of a bankrupt, though payable to his legal representatives, does not vest in the trustee, as assets of the bankrupt's estate, if the policy has no cash-surrender value. It follows that, under the evidence submitted upon the hearing, the learned trial judge erred in granting the injunction.

Judgment reversed.

All the Justices concur.

E. 336, holds that the title to insurance policies which had been fraudulently assigned do not vest in a receiver in supplementary proceedings, as he takes only the property which the judgment debtor had when the receiver was appointed.

See also Rodwell v. Johnston, 152 Ind. 525, 52 N. E. 798, *infra*, II. b, 1.

Conyne v. Jones, 51 Ill. App. 17, holds that a policy taken out for his own benefit by the assured, and assigned by him to his wife with a provision that in case of her death before him it shall revert to him as if no assignment had been made, belongs equitably to the wife, and her fraudulent transfer thereof is ground for an attachment. The opinion does not indicate that it was sought to attach the policy, but only to attach other property on the ground of fraud in the transfer of the policy. The argument, however, would seem to indicate that it was sought to attach the policy also.

b. *Policy payable at specified date unless insured dies sooner.*

1. *Policy payable to insured if living; otherwise to his estate or personal representatives.*

Policies of this kind are within the bankrupt act of 1898, § 70 (5), and pass to the trustee in bankruptcy.

Thus, *Re* Lange, 91 Fed. Rep. 361, Reversing 1 Nat. Bankr. News, 44, holds that a ten-payment endowment policy payable to the insured fifteen years after its date, and having a cash-surrender value of over $400, forms part of the assets of the trustee in bankruptcy, unless redeemed under § 70 (5), providing that the trustee shall be entitled to a policy on the life of the insured, payable to himself, his estate or legal representatives, which has a cash-surrender value, unless such value is paid to him, although § 6 provides that such act shall not affect the allowance to bankrupts of the exemptions prescribed by the laws of the state of their residence, and the statute of the state where the bankrupt resides provides that the proceeds of an endowment policy payable to the insured on attaining a certain age shall be exempt.

Kratzenstein v. Lehman, 18 Misc. 590, 42 N. Y. Supp. 237, Affirmed in 19 Misc. 600, 44 N. Y. Supp. 369, holds that the interest of an insured in an endowment policy payable to him ten years after date if then alive, or to his estate on his earlier death, may, when it has a surrender value, be attached by a creditor before the end of the ten years, under N. Y. Code Civ. Proc. § 648, providing that an attachment may be levied on a cause of action arising on contract, whether past due or yet to become due.

A contrary view was held on a prior hearing, 17 Misc. 64, 39 N. Y. Supp. 838.

Briggs v. McCullough, 36 Cal. 542, holds that a one-payment policy payable to the insured or his assigns ten years after date or on his death if earlier, and such dividends as his deposit shall earn, is not exempt under the California statute providing for the exemption of a policy taken out in a company incorporated under the laws of the state, where the annual premiums do not exceed $500.

And *Re* Sawyer, 2 Hask. 153, Fed. Cas. No. 12,393, holds that a paid-up policy payable in five years is not exempt under U. S. Rev. Stat. § 5045, exempting such property as is exempt under the state laws, and Me. Rev. Stat. chap. 44, § 45, providing that all life policies are exempt when the annual cash premiums do not exceed $150, but that in case they do exceed such amount the creditors shall have a lien for so much of two years' premiums as exceeds such amount per year.

The same case holds, however, that a policy payable to the insured at the expiration of ten years or at his death if earlier, during which time annual premiums are to be paid, is exempt, and does not pass to his assignee in bankruptcy except as to the excess of two annual premiums over $150 per year.

Rhode Island Nat. Bank v. Chase, 16 R. I. 37, 12 Atl. 233, holds that a policy payable to the insured if living at a specified date, and to his executors, administrators, or assigns on his earlier death, although containing no guaranty of any cash-surrender value before maturity, passes under a voluntary assignment for creditors before the policy matures, of all his property except such as is by law exempt from attachment, as such exemption covers only the statutory ones.

The same case holds that the policy would not be exempt under the policy of the law, within R. I. Pub. Stat. chap. 209, § 4, cl. 14.

Tradesmen's Nat. Bank v. Cresson, 10 Pa. Co. Ct. 57, holds that an endowment policy payable to the insured on a specified date if living, and to his executors, administrators, or assigns in case of his earlier death, and which provides for a paid-up policy after two payments have been made, is subject to attachment after such two payments have been made, where the insured has absconded, as against a claim of the insurance company against the insured which was not due when the attachment was issued.

And Reynolds v. Ætna L. Ins. Co. 6 App. Div. 254, 39 N. Y. Supp. 883, holds that a policy payable to the insured if living at a specified date, otherwise to his estate, is "property" the legal title of which passes to a receiver in supplementary proceedings appointed before such date.

But Rodwell v. Johnston, 152 Ind. 525, 52 N. E. 798, holds that where an endowment policy payable to the insured, his heirs, executors, administrators, or assigns had been transferred to his wife in good faith for value before the rendition of the judgment against the

insured, the judgment creditor could not reach the policy by supplementary proceedings.

2. *Policy payable to insured if living; otherwise to wife, child, or other relatives.*

Policies of this kind are also within the bankrupt act of 1898, § 70 (5). *Re* Hernich, 1 Am. Bankr. Rep. 713, is to the contrary. This case holds that a policy payable to the insured twenty years from date, or in case of his prior death to his wife if living, and, if not, to his executors or administrators, which has a cash-surrender value of a specified amount, and which has nearly seventeen years to run, is not within such § 70, where the surrender value is not, by the terms of the policy, payable to the insured before maturity without a release from the wife, as such section applies only when the policy has a present value of which the bankrupt can personally avail himself.

The court, however, refused to follow this decision in *Re* Boardman, 103 Fed. Rep. 783, which holds that the trustee in bankruptcy of one having a tontine policy on his life payable to himself on a specified date if living, or on his earlier death to his mother if living, if not to himself, his executors, administrators or assigns, cannot be required to deliver up the policy where it has a cash-surrender value which the company is willing to pay on obtaining the required releases from the insured and the beneficiary, although such value is not stated anywhere in the policy, and although the beneficiary refuses to execute a release, as the trustee has at least some interest in the policy.

And *Re* Steele, 98 Fed. Rep. 78, holds that where a policy is payable to the insured at the end of a specified period if living, but to his wife on his earlier death, the surrender value is payable to the husband, and the policy passes to his trustee in bankruptcy unless the surrender value is paid, as provided for in § 70 (5).

And in *Re* Diack, 100 Fed. Rep. 770, Reversing 2 Nat. Bankr. News, 354, an endowment policy was made payable to the insured if living at the end of the term, otherwise to his wife if living, and if not to his executors, administrators, or assigns, and the insured, after paying a few premiums, ceased to do so and the wife thereafter paid them. The insured became bankrupt, and the court held that his wife had a contingent legal interest in the policy authorizing her to continue payment of the premiums, and that on a surrender of the policy she would have a lien on the interest of her husband for the proportion which her interest bore to the entire surrender value, and that she would also be entitled to her own proportion of the surrender value, and that the husband's trustee in bankruptcy would be entitled to the remainder. And that, upon the wife's refusal to surrender the policy, the bankrupt could be compelled to assign his interest to the trustee as of the date of the adjudication, and that the amount so assigned should be made payable out of the proceeds of the policy on its maturity or whenever sooner paid.

And *Re* Grahs, 1 Am. Bankr. Rep. 465, holds that a ten-payment endowment policy payable to the insured if living at its maturity, otherwise to his wife, leaving a specified reserve value which is proximately the cash-surrender value, is within § 70 (5), if the title still remains in him at the time a voluntary petition in bankruptcy is filed by him after all the premiums are paid but before the maturity of the policy.

This case also holds that if the policy had been fraudulently transferred by the bankrupt to his wife within the period of the statute of limitations, though more than four months before the filing of the petition, the trustee in bankruptcy would have a right to have the transfer set aside, and the policy would form part of the assets, as § 67*e*, making fraudulent conveyances within four months of the filing of the petition absolutely void, does not prevent an action to have an earlier transfer declared void. The trustee, however, is not entitled to the possession of the policy until such an action has been brought and determined in his favor.

Re Adams, 104 Fed. Rep. 72, however, holds that a discharge in bankruptcy will not be refused on the ground of fraudulent concealment because of the omission from the schedule of the bankrupt, who was a man of advanced years, of insurance policies payable to him in five years if living, and, in case of his death, to his daughters, and pledged for a debt exceeding their surrender value, as the interest of the bankrupt in them, if any, is so vague, indefinite, and uncertain.

In Atkins v. Equitable Life Assur. Soc. 152 Mass. 395, the court states, by way of argument, that where a paid-up policy is made payable to the insured on a specified date if living, but to his wife on his earlier death, the wife has a distinct interest in the policy, and in its cash-surrender value, which does not pass to the husband's assignees in bankruptcy on his becoming bankrupt before such date.

Brigham v. Home L. Ins. Co. 131 Mass. 319, holds that an assignee in bankruptcy is entitled to the possession, for the purpose of collecting when due, of an endowment policy payable to the insured six years after date if living, otherwise to his children, on which two premiums have been paid, and that he may maintain an action in equity to recover the same from the company where the bankrupt has attempted to surrender the same to it.

And Bassett v. Parsons, 140 Mass. 169, 3 N. E. 547, holds that where a special attachment was issued just after the maturity of an insurance policy on the life of the debtor for the benefit of his children, with a provision that if he survived until the maturity of the policy the sum insured should be paid to him, the insured having gone into insolvency before the trustee process was served upon the insurance company but after the commencement of the action, and the assignee in insolvency puts in a claim, the company is properly discharged, as the right of the insured to have the money paid to him is "property" within Mass. Pub. Stat. chap. 157, § 46, from the moment the contract is made, and that all the rights of the insured therein passed to such assignee. The court in this case did not consider the question whether the children had any interest in the insurance money, as such question was not involved.

3. *Policy payable to wife at maturity.*

A tontine policy dependent on the insured surviving a specified date was entered into by him on behalf of his wife, the sum insured being payable to her if she was living, if not to his children, if any, and if none, to his executors, with four options in the wife, one of which was to take the cash value at the expiration of the tontine period. Before such expiration the assured filed a liquidation petition and obtained his discharge. At the end of the period the wife exercised her option to take the cash, and received it. The court held that at the commencement of the proceedings, and at the time of the discharge, there was

a mere contingency that any money would become due on the policy, and that the trustee was not entitled to any part of it. *Ex parte* Dever, L. R. 18 Q. B. Div. 660, 56 L. J. Q. B. N. S. 552.

III. *Bankruptcy or insolvency of beneficiary or assignee.*

A policy payable to the wife of the insured, in which she is a contracting party, is within § 70 (5) of the bankrupt act of 1898, on the wife's becoming bankrupt.

Thus, *Re* Steele, 98 Fed. Rep. 78, holds that a policy payable to the wife of the insured, who by its terms is required to pay the premiums, and who is entitled to the cash-surrender value if the policy is terminated, and who has the right to terminate the policy by receiving such cash-surrender value, forms part of her estate in bankruptcy to which the trustee is entitled, unless the surrender value is paid or secured as provided in such section.

But where the beneficiary is not the party contracting with the company, and the surrender value would not be payable to him or his estate, the policy does not pass to his trustee in bankruptcy. *Re* McDonnell, 101 Fed. Rep. 239.

Brossard v. Massouin (Can. Sup. Ct.) as digested in 4 Ins. L. J. 395, holds that a public trader who effects an insurance on her husband's life will not be compelled to deliver the policy to her assignee in bankruptcy as part of her estate, as the statute of 29 Vict. chap. 17, provides that such a policy cannot be subjected by either her own or her husband's creditors.

Troy v. Sargent, 132 Mass. 408, holds that a policy on one's life for the benefit of his wife may be reached during the husband's lifetime by a creditor of the wife by a bill in equity, under Mass. Gen. Stat. chap. 113, § 2, cl. 11, as chap. 58, § 62, provides that such policies inure to the separate use and benefit of the wife and children of the insured, and the children are not necessary parties to such an action, as they have no interest until her death, and then only in what was not required for the payment of debts.

Conyne v. Jones, 51 Ill. App. 17, holds that where a certificate in a beneficiary society is in favor of the member's wife, and the member enters into a contract and pays the assessments, he has an absolute right to change the beneficiary at any time with the consent of the company, so that an assignment by her cannot be regarded as fraudulent to her creditors or ground for an attachment against her. Although the opinion in this case does not indicate that the creditor sought to attach the insurance policy, the argument would seem to indicate that such an effort was made.

And Leonard v. Clinton, 26 Hun, 289, holds that a policy taken out on one's life in favor of his wife and children, under N. Y. Laws 1840, chap. 80, as amended by N. Y. Laws 1870, chap. 277, is not subject to the claims of creditors of the wife, and that they can reach no part of such policy.

50 L. R. A.

Re Murrin, 2 Dill. 120, Fed. Cas. No. 9,968, *sub nom. Re* Owen, 8 Nat. Bankr. Reg. 6, Fed. Cas. No. 10,627, holds that where a wife takes out a policy on her life payable to her husband on her death, and he is adjudicated a bankrupt within a year thereafter, and the wife continues to pay the premiums for two years and then dies, the assignee in bankruptcy has no right to the proceeds of the policy, but they go to the husband individually, as he had at the time of his bankruptcy no interest in the policies which would pass to the assignee.

In Friedlander v. Mahoney, 31 Iowa, 311, it was held that, whether or not a policy of insurance in favor of the wife of the insured is exempt in Iowa from the payment of her debts during her husband's lifetime, a stock of goods owned by her in satisfaction of the mortgage on which the policy was assigned by her was not exempt.

McElroy v. John Hancock Mut. L. Ins. Co. 88 Md. 137, 41 Atl. 112, holds that where an insolvent holds the legal title to an insurance policy on the life of another, and also an undivided interest as a legatee of the assignee, and a further interest for premiums paid by him under an agreement with the other beneficiaries, both the legal title and the beneficial interest pass to his trustee in insolvency so as to entitle the trustee to sue on the policy after the death of the insured.

IV. *Summary.*

In conclusion, ordinary life policies payable to the insured or his estate or legal representatives, and endowment policies payable to him at maturity, and either to his estate or to his wife or other relatives on his earlier death, are within the bankrupt act of 1898, § 70 (5), providing that the trustee in bankruptcy shall be entitled to a policy on the life of the insured payable to himself, his estate, or legal representatives, if it has a cash-surrender value, unless such value is paid to him.

A policy payable to the wife of the insured does not pass to his trustee in bankruptcy; but it does pass to her trustee, if she was a party to the contract and the policy has a cash-surrender value, unless such value is paid to the trustee.

In case of an assignment of the policy it is essential that notice of the assignment shall be given to take the policy out of the order and disposition of the assignor on his becoming bankrupt or insolvent. If the policy is fraudulently assigned it may be reached and subjected by creditors to payment of their debts in a proper proceeding.

The cash-surrender value of a policy is ordinarily the interest which can be subjected to the payment of debts, though in some cases the entire policy has been held to pass, and in others the balance remaining after allowing for premiums paid by the assignees or other persons than the bankrupt or insolvent, or premiums paid by him after the bankruptcy or insolvency occurs.

J. H. H.

UNITED STATES CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT.

CINCINNATI, NEW ORLEANS, & TEXAS PACIFIC RAILWAY COMPANY, S. M. Felton, Receiver, *Appt.*,
v.
Mary R. GRAY, Admrx., etc., of Fletcher B. Gray, Deceased.

(101 Fed. Rep. 623.)

1. **The filing of amended petitions,** even at or near the final hearing of the case, is entirely within the discretion of the trial court, and not reviewable on appeal.
2. **Refusal of a rehearing** is not reviewable on appeal.
3. **Restating the circumstances of an injury** as the evidence develops them is not within the rule that in case of an amended petition setting up an entirely new and distinct cause of action the statute of limitations will not cease to run until it is filed.
4. **A general yard master of a railroad** is a fellow servant of a yard foreman, within the rule that the master is not liable to one for the negligence of the other.
5. **A railroad company which substitutes a so-called "automatic" switch** for those in ordinary use, which is not intended to operate itself except in cases of emergency, and, if not properly operated, may, under certain circumstances, be very dangerous, must instruct employees, or promulgate rules as to its operation.

(May 8, 1900.)

APPEAL by defendant from a judgment of the Circuit Court of the United States for the District of Kentucky in favor of plaintiff in an action brought to recover damages for the alleged negligent killing of plaintiff's intestate. *Affirmed.*

Before *Lurton* and *Day*, Circuit Judges, and *Evans*, District Judge.

Statement by **Evans**, District Judge:

Samuel Thomas, as complainant, instituted a suit in equity in the court below, having for its chief purpose the foreclosure of a mortgage on the Cincinnati, New Orleans, & Texas Pacific Railway. Pending the litigation, the appellant S. M. Felton was appointed the receiver of the court in the cause, and was charged with the duty of continuing the operations of the railroad. An order was entered requiring all persons having claims against the receiver to file them with the master, Richard P. Ernst, Esq., instead of formally suing upon them, and he was directed to report thereon. In pursuance of this requirement the appellee, whose intestate husband was killed while in the service of the receiver, filed a petition before the master, setting up her claim to damages, and no objection was made to this form of proceeding. The petition was several times amended during the progress of the hearings, and again with leave of the court at the trial. The material facts of the case, as we find them from the record, are that the petitioner's intestate, Fletcher B. Gray, was a yard foreman in the service of the receiver, in the extensive yards of the railway company at Somerset, Kentucky, on Sunday, March 26, 1893; that two or three days before that date the receiver for the first time had placed in the track of the railroad in the yards at that point what is called an "automatic switch," in substitution for one of a different sort, but had made no rules to govern its use, nor had the receiver given any notice of its dangerous character under certain probable conditions, nor any other instructions upon the subject, and it is not shown that Gray knew anything which was not apparent of the nature of the new appliance further than that one Fred. Cook, the general yard master, had informed the employees that the switch worked automatically; that in fact, however, the switch was not intended by the receiver to be left to work itself automatically, but it was intended that it should always be set by hand; that it was in some sense a switch for emergencies, though our view of the precise character of the switch will be stated further along; that the said Cook was general yard master and in complete control of the yards; that upon the date named he got upon an engine, attached to the front of which were two caboose cars, and to the rear another caboose, which was many tons lighter than the engine; that the train thus made up was moved backward, the engine being reversed, thus throwing the single caboose in front of the train as it was moved rapidly south along the main track through the yards; that the engine, in the temporary absence of the regular engineer, was operated by Cook, who, however, was not an experienced engineer; that Gray was on the front caboose of the moving train; that the switch was open; that Gray's attention was called to this fact as the train approached it, but he said it was all right, a remark probably made because he relied upon what Cook, the general yard master, had told the employees, to the effect that the switch worked automatically; that the train, moving at the rate of 18 or 20 miles an hour, went upon the switch; that it was not thrown by the caboose in front, but that the latter mounted the rail, and went off the track upon the right side, while the force and weight of the engine following threw the switch as it went through it, thereby keeping the engine and the other caboose cars upon the track until the engine was thrown off to the left by the front caboose in consequence of its derailment; that there was at the time a box car standing on another and parallel track, and the caboose upon which Gray was riding when it was derailed came in collision with the box car, whereby he was mortally wounded, and soon afterwards died. It is also claimed that the

NOTE.—On the question of the duty of a master to instruct and warn his servants as to the perils of the employment, see *note* to James v. Rapides Lumber Co. (La.) 44 L. R. A. 33.

plates upon which the switch was to move, in being opened and closed, were not oiled, but were impeded by the presence of loose cinders or slag, which prevented the prompt closing of the switch. It is shown that this character of switch had been in use upon other railroads for many years; that the one in use here was well constructed and of good quality, and that it had been carefully selected, and was up to the standard of such appliances. It also appears that the railroad track was in good condition at the time. Upon these facts the master reported that the receiver should pay the administratrix of Gray the sum of $8,000 as damages, the circuit court approved this action of the master, judgment was entered accordingly, and, a petition for rehearing having been denied, the case comes here upon appeal from that judgment.

Messrs. **Harmon, Colston, Goldsmith, & Hoadly** and **Spotswood D. Bowers,** for appellant:

There was a well-known and well-understood regulation prohibiting running through switches.

The rule governing switches generally was understood by employees as applying to these automatic switches also.

The receiver was not bound to assume that any employee would treat this particular switch as an exception to the rule.

The receiver was not bound to assume that, because the switch would work automatically, it would be used automatically without instructions so to use it. On the contrary, the receiver had the right to assume that this switch would not be used automatically by employees unless they were told so to use it.

Wolscy v. *Lake Shore & M. S. R. Co.* 33 Ohio St. 227.

The duty of an employer to instruct an employee as to the mode of using any machinery or any implement is based upon the proposition that to use the implement or machinery the wrong way is dangerous to the servant; otherwise, there is no need, as between master and servant, of any regulation concerning its use.

2 Bailey, Personal Injuries Relating to Master & Servant, § 2700; Shearm. & Redf. Neg. § 202.

There was no reason why the receiver should have supposed that the use of this switch automatically involved danger to the employees.

Between master and servant the mere happening of an accident is not of itself even prima facie proof of negligence.

Trinity County Lumber Co. v. *Denham,* 85 Tex. 56, 19 S. W. 1012; *Stern* v. *Michigan C. R. Co.* 76 Mich. 591, 43 N. W. 587; *Werbowlsky* v. *Fort Wayne & E. R. Co.* 86 Mich. 236, 48 N. W. 1097; *Toomey* v. *Eureka Iron & Steel Works,* 89 Mich. 249, 50 N. W. 850; *Yarnell* v. *Kansas City, Ft. S. & M. R. Co.* 113 Mo. 570, 18 L. R. A. 599, 21 S. W. 1; *Philadelphia & R. R. Co.* v. *Hughes,* 119 Pa. 301, 13 Atl. 286; *Melchert* v. *Smith Brewing Co.* 140 Pa. 448, 21 Atl. 755; *Ash* v. *Verlenden Bros.* 154 Pa. 246, 26 Atl. 374; *Dobbins* v. *Brown,* 119 N. Y. 188, 23 N. E. 537; *Sack* v. *Dolese,* 137 Ill. 129, 27 N. E. 62; *Knight* v. *Cooper,* 36 W. Va. 232, 14 S. E. 999; *Brymer* v. *Southern P. Co.* 90 Cal. 496, 27 Pac. 371; *Louisville & N. R. Co.* v. *Binion,* 98 Ala. 570, 14 So. 619; *De Vau* v. *Pennsylvania & N. Y. Canal & R. Co.* 130 N. Y. 632, 28 N. E. 532; *Robinson* v. *Charles Wright & Co.* 94 Mich. 283, 53 N. W. 938; Bailey, Personal Injuries Relating to Master & Servant, § 1597.

The use of an appliance which experience has shown to be safe is not negligence, though an accident results from its use.

La Pierre v. *Chicago & G. T. R. Co.* 99 Mich. 212, 58 N. W. 60; *Burke* v. *Witherbee,* 98 N. Y. 562; *Stringham* v. *Hilton,* 111 N. Y. 188, 1 L. R. A. 483, 18 N. E. 870; *Sjogren* v. *Hall,* 53 Mich. 274, 18 N. W. 812; *Loftus* v. *Union Ferry Co.* 84 N. Y. 455, 38 Am. Rep. 533; *Cleveland* v. *New Jersey S. B. Co.* 68 N. Y. 306; *Dougan* v. *Champlain Transp. Co.* 56 N. Y. 1; *Crocheron* v. *North Shore Staten Island Ferry Co.* 56 N. Y. 656; *Titus* v. *Bradford, B. & K. R. Co.* 136 Pa. 618, 20 Atl. 517; *Mississippi River Logging Co.* v. *Schneider,* 34 U. S. App. 743, 74 Fed. Rep. 195, 20 C. C. A. 390.

Even if there were any dangers connected with the use of this switch automatically, they were obvious dangers, and as well known to Cook as to anybody else. The whole *modus operandi* of the switch was ascertainable at a glance. It was all open to observation, nothing concealed, and nothing that a child could not understand.

The servant of mature age and of experience is charged by law with knowledge of obvious dangers, and of those things that are within common observation and are according to natural law.

Mississippi River Logging Co. v. *Schneider,* 34 U. S. App. 743, 74 Fed. Rep. 197, 20 C. C. A. 390.

The court erred in deciding the case against the receiver on a ground of negligence not raised by the pleadings, and in allowing the intervener to file her third amended petition in order to set out facts consistent with its opinion and which had not been alleged in any of her previous three petitions.

Greer v. *Louisville & N. R. Co.* 94 Ky. 169, 21 S. W. 649; *Louisville & N. R. Co.* v. *McGary,* 20 Ky. L. Rep. 691, 47 S. W. 440; *Clyde* v. *Richmond & D. R. Co.* 59 Fed. Rep. 394; *Gulf, C. & S. F. R. Co.* v. *Beall* (Tex. Civ. App.) 43 S. W. 605; *Werbowlsky* v. *Fort Wayne & E. R. Co.* 86 Mich. 236, 48 N. W. 1097; *Yarnell* v. *Kansas City, Ft. S. & M. R. Co.* 113 Mo. 570, 18 L. R. A. 599, 21 S. W. 1; *McCain* v. *Louisville & N. R. Co.* 13 Ky. L. Rep. 334.

Cook, the yardmaster, was a fellow servant of Gray, the decedent.

New England R. Co. v. *Conroy,* 175 U. S. 323, 44 L. ed. 181, 20 Sup. Ct. Rep. 85.

Where a master furnishes appliances such as are in general use throughout the coun-

try in similar business, and employs them in the accustomed manner, he is not liable for an injury caused by such appliances, and it is not negligent for him to use such appliances in such manner.

Mississippi River Logging Co. v. *Schneider*, 34 U. S. App. 743, 74 Fed. Rep. 195, 20 C. C. A. 300; *Titus* v. *Bradford, B. & K. R. Co.* 136 Pa. 618, 20 Atl. 517; *Fritz* v. *Salt Lake & O. Gas & L. Co.* 18 Utah, 493, 56 Pac. 90; *Shadford* v. *Ann Arbor Street R. Co.* 111 Mich. 300, 69 N. W. 661; *Louisville & N. R. Co.* v. *Allen*, 78 Ala. 494; *Kehler* v. *Schwenk*, 144 Pa. 348, 13 L. R. A. 374, 22 Atl. 910; *Hagan* v. *Chicago, D. & C. G. T. Junction R. Co.* 86 Mich. 615, 49 N. W. 509; *Schroeder* v. *Michigan Car Co.* 56 Mich. 132, 22 N. W. 220.

It is the nature of the duty performed by the servant, and not the rank of the servant performing it, that determines the liability of the master for the act of one servant towards another.

Gulf, C. & S. F. R. Co. v. *Schwabbe*, 1 Tex. Civ. App. 573, 21 S. W. 706; *Baltimore & O. R. Co.* v. *Baugh*, 149 U. S. 368, 37 L. ed. 772, 13 Sup. Ct. Rep. 914; *Chicago, M. & St. P. R. Co.* v. *Ross*, 112 U. S. 377, 28 L. ed. 787, 5 Sup. Ct. Rep. 184; *Northern P. R. Co.* v. *Hambly*, 154 U. S. 349, 38 L. ed. 1009, 14 Sup. Ct. Rep. 983; *Central R. Co.* v. *Keegan*, 160 U. S. 259, 40 L. ed. 418, 16 Sup. Ct. Rep. 269; *Northern P. R. Co.* v. *Peterson*, 162 U. S. 346, 40 L. ed. 994, 16 Sup. Ct. Rep. 843; *Oakes* v. *Mase*, 165 U. S. 363, 41 L. ed. 747, 17 Sup. Ct. Rep. 345; *Martin* v. *Atchison, T. & S. F. R. Co.* 166 U. S. 399, 41 L. ed. 1051, 17 Sup. Ct. Rep. 603; *Northern P. R. Co.* v. *Poirier*, 167 U. S. 48, 42 L. ed. 72, 17 Sup. Ct. Rep. 741; *Alaska Treadwell Gold Min. Co.* v. *Whelan*, 168 U. S. 86, 42 L. ed. 390, 18 Sup. Ct. Rep. 40; *McGrath* v. *Texas & P. R. Co.* 23 U. S. App. 86, 60 Fed. Rep. 555, 9 C. C. A. 133; *St. Louis, I. M. & S. R. Co.* v. *Needham*, 27 U. S. App. 227, 25 L. R. A. 833, 63 Fed. Rep. 107, 11 C. C. A. 56; *Cleveland, C. C. & St. L. R. Co.* v. *Brown*, 34 U. S. App. 759, 73 Fed. Rep. 970, 20 C. C. A. 147; *Balch* v. *Haas*, 36 U. S. App. 693, 73 Fed. Rep. 674, 20 C. C. A. 151; *New England R. Co.* v. *Conroy*, 175 U. S. 323, 44 L. ed. 181, 20 Sup. Ct. Rep. 85.

While the making of amendments is undoubtedly a matter within the sound discretion of the court, yet the abuse of that discretion is proper matter for appeal.

Wright v. *Hollingsworth*, 1 Pet. 165, 7 L. ed. 96; *Gormley* v. *Bunyan*, 138 U. S. 623, 34 L. ed. 1086, 11 Sup. Ct. Rep. 453.

On petition for rehearing.

The second amended petition, and the third amended petition, introduced a new cause of action, and therefore one that was barred by the statute of limitations.

Union P. R. Co. v. *Wyler*, 158 U. S. 285, 39 L. ed. 983, 15 Sup. Ct. Rep. 877; 1 Chitty, Pl. *674; Gould, Pl. pp. 423, 424; *Henries* v. *Stiers*, 8 N. J. L. 364; *State* v. *Grimsley*, 19 Mo. 171.

The cause of action in this case consisted of two factors: first, the duty owing from the defendant to Gray; second, the delict of the defendant constituting the violation of that duty. In the first petition the delict of the defendant was the negligence of Cook, Cook's act being made the act of the defendant on the principle of *qui facit per alium facit per se*, while in the last petition there was no negligence at all on the part of Cook his act was perfectly innocent, but the delict of the defendant was the failure to perform a personal duty by giving information to Cook, and prescribing rules.

Box v. *Chicago, R. I. & P. R. Co.* 107 Iowa, 660, 78 N. W. 694; *Rodgers* v. *Mutual Endowment Assessment Asso.* 17 S. C. 407; *Flatley* v. *Memphis & C. R. Co.* 9 Heisk. 234; *Hutchinson* v. *Ainsworth*, 73 Cal. 455, 15 Pac. 82; *East Line & R. River R. Co.* v. *Scott*, 75 Tex. 84, 12 S. W. 995; *Sicard* v. *Davis*, 6 Pet. 124, 8 L. ed. 342; *Weldon* v. *Neal*, L. R. 19 Q. B. Div. 394.

The rule as to amendments in equity is the same as that in law, so far as the matter of limitation is concerned.

Buswell, Limitations, 515; *Dudley* v. *Price*, 10 B. Mon. 88.

Mr. **Edgar W. Cist,** with *Messrs.* **C. M. Cist** and **Harlan Cleveland,** for appellee:

The duties to provide a safe system, adopt adequate rules, and warn employees of dangers are primary duties of a master.

What his representative orders, or does, or leaves undone as to these matters, within the apparent scope of his delegated authority, are the orders, acts, and omissions of the master to the servants of the master. If there is negligence the master is negligent.

2 Shearm. & Redf. Neg. 5th ed. §§ 203*a*, 204; Bailey, Personal Injuries Relating to Master & Servant, p. 128; *Hough* v. *Texas & P. R. Co.* 100 U. S. 213, 25 L. ed. 612; *Northern P. R. Co.* v. *Herbert*, 116 U. S. 642, 29 L. ed. 755, 6 Sup. Ct. Rep. 590; *Union P. R. Co.* v. *Daniels*, 152 U. S. 684, *sub nom. Union P. R. Co.* v. *Snyder*, 38 L. ed. 597, 14 Sup. Ct. Rep. 756; *Baltimore & O. R. Co.* v. *Baugh*, 149 U. S. 368, 37 L. ed. 772, 13 Sup. Ct. Rep. 914; *Northern P. R. Co.* v. *Peterson*, 162 U. S. 353, 40 L. ed. 997, 16 Sup. Ct. Rep. 843; *Little Rock & M. R. Co.* v. *Moseley*, 12 U. S. App. 514, 56 Fed. Rep. 1012, 6 C. C. A. 225; *Ford* v. *Fitchburg R. Co.* 110 Mass. 240, 14 Am. Rep. 598; *Louisville & N. R. Co.* v. *Ward*, 18 U. S. App. 683, 61 Fed. Rep. 927, 10 C. C. A. 166; *Pantzar* v. *Tilly Foster Iron Min. Co.* 99 N. Y. 368, 2 N. E. 24; *Mann* v. *Delaware & H. Canal Co.* 91 N. Y. 495; *Bailey* v. *Rome, W. & O. R. Co.* 139 N. Y. 302, 34 N. E. 918; *Pennsylvania R. Co.* v. *La Rue*, 55 U. S. App. 20, 81 Fed. Rep. 148, 27 C. C. A. 363; *Smith* v. *Baker* [1891] A. C. 325.

It is a personal duty of a master in a dangerous and complicated business to prescribe rules sufficient for its orderly and safe management, and to keep his servants informed thereof so far as needful for their guidance.

Baltimore & O. R. Co. v. *Camp*, 31 U. S. App. 213, 65 Fed. Rep. 952, 13 C. C. A. 233; *Slater* v. *Jewett*, 85 N. Y. 61, 39 Am. Rep. 627; Shearm. & Redf. Neg. 5th ed. § 202;

Frost v. *Oregon Short Line & U. N. R. Co.* 69 Fed. Rep. 936; *Norman* v. *Wabash R. Co.* 22 U. S. App. 505, 62 Fed. Rep. 727, 10 C. C. A. 617; *Texas & P. R. Co.* v. *Archibald*, 170 U. S. 665, 42 L. ed. 1188, 18 Sup. Ct. Rep. 777; *Holman* v. *Kempe*, 70 Minn. 422, 73 N. W. 186; *Mather* v. *Rillston*, 156 U. S. 391, 39 L. ed. 464, 15 Sup. Ct. Rep. 464; *Wheeler* v. *Wason Mfg. Co.* 135 Mass. 294; *Lynch* v. *Allyn*, 160 Mass. 248, 35 N. E. 550.

None of these duties can be so delegated as to relieve the master for a failure on the part of his subordinates to whom the duty is delegated to exercise proper care for their discharge.

Baltimore & O. R. Co. v. *Henthorne*, 43 U. S. App. 113, 73 Fed. Rep. 634, 19 C. C. A. 623; *Smith* v. *Hillside Coal & I. Co.* 186 Pa. 28, 40 Atl. 287; *Alton Paving, Bldg. & Fire Brick Co.* v. *Hudson*, 74 Ill. App. 612; *Gowen* v. *Bush*, 40 U. S. App. 349, 76 Fed. Rep. 349, 22 C. C. A. 196; *Wabash Western R. Co.* v. *Brow*, 31 U. S. App. 192, 65 Fed. Rep. 941, 13 C. C. A. 222.

Gray was led by the receiver into danger through the instructions of the receiver's agent acting within the scope of his authority.

Gowen v. *Bush*, 40 U. S. App. 349, 76 Fed. Rep. 349, 22 C. C. A. 196.

The amendments setting up additional grounds of negligence did not introduce any new cause of action, and the action of the court in allowing the amendments, as well as its action in denying the petition for rehearing, is discretionary, and not assignable for error.

Smith v. *Missouri P. R. Co.* 12 U. S. App. 426, 56 Fed. Rep. 458, 5 C. C. A. 557; *Columb* v. *Webster Mfg. Co.* 50 U. S. App. 264, 43 L. R. A. 195, 84 Fed. Rep. 592, 28 C. C. A. 225; *Cross* v. *Evans*, 52 U. S. App. 720, 86 Fed. Rep. 1, 29 C. C. A. 523; *Sherman Oil & Cotton Co.* v. *Stewart*, 17 Tex. Civ. App. 59, 42 S. W. 241; *Greer* v. *Louisville & N. R. Co.* 94 Ky. 169, 21 S. W. 649; *Northern P. R. Co.* v. *Craft*, 29 U. S. App. 687, 69 Fed. Rep. 124, 16 C. C. A. 175.

The action of the trial court in allowing or disallowing amendments is discretionary, and not reviewable on appeal or error.

Bullitt County v. *Washer*, 130 U. S. 142, 32 L. ed. 885, 9 Sup. Ct. Rep. 499; *Chapman* v. *Barney*, 129 U. S. 677, 32 L. ed. 800, 9 Sup. Ct. Rep. 426; *Mandeville* v. *Wilson*, 5 Cranch, 15, 3 L. ed. 23; *Sheehy* v. *Mandeville*, 6 Cranch, 253, 3 L. ed. 215; *Walden ex dem. Donn* v. *Craig*, 9 Wheat. 576, 6 L. ed. 164; *Chirac* v. *Reinicker*, 11 Wheat. 280, 6 L. ed. 474; *Wright* v. *Hollingsworth*, 1 Pet. 165, 7 L. ed. 96; *United States* v. *Buford*, 3 Pet. 12, 7 L. ed. 585; *Murphy* v. *Stewart*, 2 How. 263, 11 L. ed. 261; *Ex parte Bradstreet*, 7 Pet. 634, 8 L. ed. 810; *Gormley* v. *Bunyan*, 138 U. S. 623, 34 L. ed. 1086, 11 Sup. Ct. Rep. 453; *Sheffield & B. Coal, I. & R. Co.* v. *Newman*, 41 U. S. App. 706, 77 Fed. Rep. 787, 23 C. C. A. 459; *Nevada Nickel Syndicate* v. *National Nickel Co.* 86 Fed. Rep. 491.

Evans, District Judge, after stating the facts as above, delivered the opinion of the court:

Error is assigned by appellant upon the action of the court below in permitting the filing of certain amended petitions, but, as these were matters entirely within the sound discretion of the trial court, the authorities are uniform to the effect that such action is not reviewable upon appeal. This rule applies quite as forcefully to the amended petition permitted to be filed at or near the final hearing of the case as to the others. *Corrections and amendments of pleadings* are liberally allowed in order to subserve the ends of justice, and to secure a thorough presentation of the claim or defense, so that its merits may be fully disclosed. There was therefore no reviewable error in the action of the circuit court in this respect.

After the judgment in the court below the appellant's counsel presented a petition for a rehearing, which was denied, and error is also assigned upon that action of the court. We need not do more than say that the cases all agree that the action of the trial court, upon petitions of this character and upon motions for new trials, is not assignable for error. They are matters of discretion entirely. It is unnecessary to cite authorities upon this point.

Nor do we think that the Kentucky statute of limitations bars the claim of the petitioner. The claim arose when the injury occurred, on March 26, 1893. The original petition was filed September 18, 1893, much less than the required one year after the injury. The second amended petition was filed on December 26, 1895, a former one not appearing in the record, and the third was, by express leave of the court, filed on April 25, 1899. The last amendment was possibly designed rather to make the pleadings conform to the proof than for any other purpose. It may be, and doubtless is, true that, when an amended petition sets up an entirely new and distinct cause of action, time, under the statute, will not cease to run until the date of filing it. *Cecil* v. *Sowards*, 10 Bush, 96; *Leatherman* v. *Times Co.* 88 Ky. 292, 3 L. R. A. 324, 11 S. W. 12. But this rule by no means applies to a case such as we have before us, in which the original and real cause of action, namely, the negligence by which Gray was injured, was never departed from nor abandoned. The plaintiff only restated the circumstances of the injury as the investigation appeared to develop them; but these were the particulars, the details merely, of the substantive claim, stated in general terms, that the injury to Gray was due to the inculpating negligence of the receiver.

The action itself, to recover damages for that negligence and its results, was the principal thing, whatever may have been the details incident thereto, and was commenced within one year, and was not barred by the statute of limitations by reason of the supplying, by amendment, of any omission, or by correcting any error in the original statement of the petitioner's claim that her intes-

tate was injured by the receiver's negligence, whether the details of its happening were one way or another. For the injuries complained of the suit was, without any objection to its form, instituted before the master in the way already mentioned, and, although the means and manner of the infliction of these injuries were variously stated, the appellee, as we have seen, always relied upon the original claim that her intestate was injured by the negligence of the receiver. It does not appear, therefore, that this assignment of error is well taken. The action was brought within the year allowed by the Kentucky statute. It has been prosecuted continuously from that time until now, and the generic cause of action has always been the same.

It was insisted in the circuit court, as it is here, that Cook was not a fellow servant of Gray, but a vice principal, and that his negligence in running the train through the switch when it was open, and his failure to accurately instruct the employees of the receiver as to the limitations upon its use, were not the negligent acts merely of a fellow servant in the same employment with the decedent, but were those of the master himself, in whose employ as vice principal it was claimed Cook in these respects stood. We cannot accept this view, but agree with the learned circuit judge in his opinion that Cook was the fellow servant of Gray, and that no liability arose out of what he did at the time of the accident nor previously in reference to the switch. This conclusion seems unavoidable upon the authority of many cases. Among them we need only cite *Northern P. R. Co.* v. *Peterson*, 162 U. S. 346, 40 L. ed. 994, 16 Sup. Ct. Rep. 843; *Baltimore & O. R. Co.* v. *Baugh*, 149 U. S. 369, 37 L. ed. 772, 13 Sup. Ct. Rep. 914; *Baltimore & O. R. Co.* v. *Camp*, 31 U. S. App. 236, 65 Fed. Rep. 952, 13 C. C. A. 233.

In accepting a voluntary employment, a servant, as is well understood, assumes all the ordinary and obvious risks of such employment, including those arising from the negligence of his fellow servants; but, in the view we take of the facts of this case, our decision must rest upon another phase of it. As we have seen, the form of switch, which is called automatic, while long, successfully, and safely used by other roads, had been in use in the yards of this railroad, when Gray was injured, only two or three days, and it is not shown that he personally had any previous knowledge of the workings or operations of such a switch, particularly in so far as they differed from the old one, which it had replaced. No instructions had been given by the receiver explaining the uses of this had replaced. No instructions had been given of the possible dangers of its use under certain altogether probable circumstances; nor had any regulations whatever been promulgated respecting its operations, although in some important respects they were very different from those of the old one. True, the switch cannot be regarded as dangerous *per se*, but certainly there were conditions upon which it might become most dangerous, and these were unknown to Gray. They existed, but he was not notified of it. Though possibly unfortunately called an "automatic switch," it was not intended to do its own work, but was intended always to be set by hand, though its automatic feature was expected to be a useful safeguard in any time of emergency due to a negligent or accidental omission to set it by hand. In this sense, and in this sense only, it was an emergency switch. It is not shown that Gray had notice of these facts. On the contrary, the little information he had about the operations of the switch tended rather to show him that it was a labor-saving device, which was designed to avoid the work of setting it by hand, and leave it to be operated upon by the force of moving cars and engines as they came upon it, thus doing its own work.

It is true that the general purpose and operations of an ordinary railroad switch were perfectly understood by Gray, and that if there had been nothing more in this case than the act of a fellow servant in running a train through a switch, known and seen to be open, there would not be the slightest right to recover for the injury inflicted in that way. But here there was a new kind of switch, very recently put in. The methods of its operation, particularly wherein they differed from those of the former switch, had not been explained to Gray, and were not obvious. The name "automatic" possibly, and even probably, carried an idea which gave weight to the general yard master's statement to the employees that the new switch would work itself, though, in fact, the receiver never intended that it should be operated in that manner. No notice was given that put the employees generally, or Gray especially, in possession of the fact that the switch, while automatic in name, did not operate, and was not intended to operate, of itself, nor otherwise than in such manner as required it always to be set by hand; nor had there been made or published any general regulations upon the subject for the guidance of the servants who were to use the new switch. It is by no means certain that the name or description of the new switch as "automatic" was not so far misleading and dangerous as to give stress to the necessity for notice and instruction.

Upon the facts shown, we think it is not difficult to deduce from the authorities the rules which fix the duties of the master in cases like this, and determine the tests of his responsibilities to his servants. The considerations which demand that the master shall furnish for his employees reasonably safe appliances for doing the work imposed upon them necessarily reach to and include the requirement that when new, and, so far as they differ and as far as the particular work is concerned, unknown and untried, appliances are substituted for old ones, he shall give full and plain instructions to employees as to the parts of such appliances which are new in operation, in order that a servant may have a fair opportunity, before incur-

ring danger, to understand the difference which might, if unknown, produce it. This *obligation on the master is equally as strong* when appliances are put in which differ only in some respects from old ones for which they are substituted as it is when there is the beginning of a work or when appliances are more radically or even entirely changed. And, indeed, this duty of the employer is emphasized when ignorance of the points of novelty, either of design or of operation, in the substituted appliance may, as here, involve the most serious consequences affecting the safety and lives of the servants. The obvious fact is that if instruction or notice of the exact situation, in respect to the new switch and its operations, had been given in this case, the accident would not have occurred, at least in the way it did. This illustrates the extreme importance of the duty of the master in regard to making known the difference between the workings of the new and the old machinery, especially where that difference is the one which, if unknown, might bring about dangerous conditions or consequences. The servant in such cases is entitled to notice and information upon these points, and it is the duty of the master to give it. His failure to do so is negligence. In the case before us there was negligence in this respect, and we do not doubt that it was the proximate cause of the injury to Gray.

In speaking of the general rule that the master is exempt from liability to one servant for injuries caused by the negligence of a fellow servant in the same employment, *and of certain exceptions thereto, the* Supreme Court, in the case of *Hough* v. *Texas & P. R. Co.* 100 U. S. 217, 25 L. ed. 615, said: One, and perhaps the most important, of those exceptions arises from the obligation of the master, whether a natural person or a corporate body, not to expose the servant, when conducting the master's business, to perils or hazards against which he may be guarded by proper diligence upon the part of the master. To that end the master is bound to observe all the care which prudence and the exigencies of the situation require in providing the servant with machinery or other instrumentalities adequately safe for use by the latter. It is implied in the contract between the parties that the servant risks the dangers which ordinarily attend or are incident to the business in which he voluntarily engages for compensation, among which is the carelessness of those, at least, in the same work or employment, with whose habits, conduct, and capacity he has, in the *course of his duties, an opportunity to be*come acquainted, and against whose neglect or incompetency he may himself take such precautions as his inclination or judgment may suggest. But it is equally implied in the same contract that the master shall supply the physical means and agencies for the conduct of his business. It is also implied, and public policy requires, that in selecting such means he shall not be wanting in proper care. His negligence in that regard is not a hazard usually or necessarily attendant upon the business. Nor is it one *which the servant, in legal contemplation,* is presumed to risk; for the obvious reason that the servant who is to use the instrumentalities provided by the master has, ordinarily, no connection with their purchase in the first instance, or with their preservation or maintenance in suitable condition after they have been supplied by the master."

In the case of *Mather* v. *Rillston*, 156 U. S. 399, 39 L. ed. 470, 15 Sup. Ct. Rep. 467, where the circumstances were such as to call for strong and emphatic language, the court said: "Indeed, we think it may be laid down as a legal principle that in all occupations which are attended with great and unusual danger there must be used all appliances, readily attainable, known to science for the prevention of accidents, and that the neglect to provide such readily attainable appliances will be regarded as proof of culpable negligence. If an occupation attended with danger can be prosecuted by proper precautions without fatal results, such precautions must be taken by the promoters of the pursuit or employers of laborers thereon. Liability for injuries following a disregard of such precautions will otherwise be incurred, and this fact should not be lost sight of. So, too, if persons engaged in dangerous occupations are not informed of the accompanying dangers by the promoters thereof, or by the employers of laborers thereon, and such laborers remain in ignorance of the dangers and suffer in consequence, the employers will also be charge*able for the injuries sustained.* Both of these positions should be borne constantly in mind by those who engage laborers or agents in dangerous occupations, and by the laborers themselves as reminders of the duty owing to them. These two conditions of liability of parties employing laborers in hazardous occupations are of the highest importance, and should be in all cases strictly enforced. Further than this, it is plain from what has already been stated that the plaintiff knew nothing of the special dangers attending his work, or that he was at all informed by the defendants on the subject. His testimony is positive on this point, and is not contradicted by anyone. With that fact shown, there was no ground for any charge of contributory negligence on his part."

While the facts of that case were quite different from those in the case before us, the general principles announced as to the duty of the master may well find application here to the extent, at least, that such application is called for. It may be that the principles enforced there would create a rule of liability beyond that demanded in this case, and they might establish a test of duty for the master much more exacting than is required in the operations of a railroad where the dangers to experienced employees are much less than those shown under the facts in that case. Still those principles do, in their scope, embrace cases like the pres-

ent, where the master so certainly failed in the discharge of his duty in the respect already indicated.

In the case of *Northern P. R. Co.* v. *Herbert*, 116 U. S., at page 648, 29 L. ed. at page 758, 6 Sup. Ct. Rep. 593, in speaking of the correlative duties and rights of master and servant in regard to machinery, appliances, etc., the Supreme Court in one sentence epitomizes a phase of the subject in this language: "His [the servant's] contract implies that in regard to these matters his employer will make adequate provision that no danger shall ensue to him." Doubtless the dangers alluded to were unnecessary or unknown dangers, but this statement from the court's opinion gives a clear idea of the master's duty in the case before us. The master should have taken adequate measures to make known the dangers which persons ignorant of the workings of the new switch might incur by its use.

Many other cases from the Supreme Court might be referred to illustrative of the general principles we are discussing, but we will only name that of *Texas & P. R. Co.* v. *Archibald*, 170 U. S. 669, 42 L. ed. 1188, 18 Sup. Ct. Rep. 777, and that of *Chicago, M. & St. P. R. Co.* v. *Ross*, 112 U. S. 377, 28 L. ed. 787, 5 Sup. Ct. Rep. 184, where, on page 382, 112 U. S., page 789, 28 L. ed., and page 186, 5 Sup. Ct. Rep. the court, after alluding to the arguments by which the doctrine that the servant assumes the known and ordinary risks of his employment are supported, said: "But, however this may be, it is indispensable to the employer's exemption from liability to his servant for the consequences of risks thus incurred that he should himself be free from negligence. He must furnish the servant the means and appliances which the servant requires for its efficient and safe performance, unless otherwise stipulated; and if he fail in that respect, and an injury result, he is as liable to the servant as he would be to a stranger. In other words, while claiming such exemption, he must not himself be guilty of contributory negligence."

In 1 Shearm. & Redf. Neg. 5th ed. § 202, the authors say: "A master who employs servants in a dangerous and complicated business is personally bound to prescribe rules sufficient for its orderly and safe management, and to keep his servants informed of these rules, so far as may be needful for their guidance."

And they amplify the principles applicable to this case in § 203 in the following language: "It is also the personal duty of the master, so far as he can, by the use of ordinary care, to avoid exposing his servants to extraordinary risks which they could not reasonably anticipate, although he is not bound to guarantee them against such risks, nor to guard against an accident which is not at all likely to happen. The master must therefore give warning to his servants of all perils to which they will be exposed, of which he is or ought to be aware, other than such as they should, in the exercise of ordinary care, have foreseen as necessarily incidental to the business in the matter and ordinary course of affairs, though more than this is not required of him. It makes no difference what is the nature of the peculiar peril, or whether it is or is not beyond the master's control. And it is not enough for the master to use care and pains to give such notice. He must see that it is actually given. If, therefore, he fails to give such warning, in terms sufficiently clear to call the attention of his servants to a peril of which he is or ought to be aware, he is liable to them for any injury which they suffer thereby without contributory negligence. Such notice must be timely—that is, given in sufficient time to enable the servant to profit by it. It is therefore the duty of the master to give adequate and timely warnings of changes in the situation involving new dangers."

The last proposition announced in the paragraph just quoted is supported by several cases, such as *Chicago & A. R. Co.* v. *Kerr*, 148 Ill. 605, 35 N. E. 1117; *Donahoe* v. *Old Colony R. Co.* 153 Mass. 356, 26 N. E. 868; *Stephenson* v. *Ravenscroft*, 25 Neb. 678, 41 N. W. 652; *Mollie Gibson Consol. Min. & Mill. Co.* v. *Sharp*, 5 Colo. App. 321, 38 Pac. 850. Elliott, in his work on Railroads (vol. 3, §§ 1258, 1272, 1273), lays down the recognized general propositions in regard to the duty of the master to furnish safe appliances and safe places for the servant to work in, but we do not deem it necessary to cite other authorities.

We conclude that while the railroad track in the yard at Somerset, and even the new switch itself, were in good physical condition, and while it is shown that the receiver used at least ordinary care to have them so, still that the existence of the latent dangers connected with the operation, by ignorant persons, of the new form of switch just put in, must have been known to the receiver, and that such information must have been acquired by him, when he was purchasing the switch and preparing to put it in use in the yard. At all events, that he must be charged with having such information we cannot doubt. If this is true, it follows that it was his duty to give notice of these dangers to Gray by explanation in some form, or by rules or regulations brought to his attention. There does not seem to have been anything of this kind done. If notice in any form of the exact facts had come to Gray before he went upon the train, his going would then have been at his own risk, and his not signaling the engineer to stop the train when he saw that the switch was open would then have been his own folly. Not to have endeavored to stop the train under such circumstances, and if he had known of the danger arising from the switch being open, would have been suicidal; but not to have made an effort to have the engineer stop, under the actual facts as disclosed by the evidence, shows the utter ignorance of Gray of the danger about which the master should have seen that he was accurately informed.

The general and correct propositions of

law that an employer does not insure the safety of his employee; that if the latter knows of risks, and voluntarily subjects himself to them, the master is not liable for the injury thereby incurred; and that, generally, all that is required of the master is to provide reasonably safe appliances for the use of his employees in their work, and reasonably safe places for them to work in,—are in no wise questioned. The sole ground upon which we rest our judgment upon this case is that there was a latent and unapparent, but a very certain and material, danger to uninformed employees, accustomed to operating the other form of switch, in the use, without sufficient knowledge, of the new so-called "automatic switch," under the circumstances of this case, of which danger it was the duty of the receiver, who must have known of it, to give, in some way, clear and unmistakable information to his employees, including Gray. The failure of the receiver to do this by regulation, rule, notice, or otherwise was such negligence upon his part as renders him liable for the injuries to Gray, who was evidently subjected to a great risk and hazard, the existence of which he did not suspect, but which could have been obviated very easily by notice to him from the better-informed receiver.

It results that *the judgment of the Circuit Court must be affirmed.*

A petition for rehearing having been filed, the following response was handed down on June 11, 1900:

In an elaborate petition the court has been asked by the appellant to rehear this case, mainly upon the ground that the statute of limitations barred the remedy of the appellee. In support of this contention he relies chiefly upon the opinion of the Supreme Court in the case of *Union P. R. Co.* v. *Wyler*, 158 U. S. 285, 39 L. ed. 983, 15 Sup. Ct. Rep. 877. This question had already received the careful consideration of the court, and there is nothing in the opinion referred to which makes it necessary for us to change our judgment. In that action against the railway company for damages, the plaintiff based his claim upon the general law of master and servant and his rights thereunder. During the progress of the suit an amended petition was filed, by which a cause of action was set up growing out of the same facts, but based upon the rights and liabilities created and existing under a statute of the state of Kansas. The statute which supported the claim made in the amended petition had created a cause of action entirely different from the one arising at common law, set up on the original petition. The court, upon that ground alone, held that there was a departure, and that the plea of the statute of limitations would therefore prevent the relief sought by the amended petition. To the case before us that ruling cannot apply, because, if for no other reason, there was no departure. The principle upon which this case must turn is very different. In *Texas & P. R. Co.* v. *Cox*, 145 U. S. 593, 36 L. ed. 829, 12 Sup. Ct. Rep. 905, the original petition claimed, as appears from the record, that the injury resulted "because of the defective condition of the cross-ties and of the roadbed, through the negligence of the receivers." In the amended petition it was averred that "Cox, in coupling the cars, as it was his duty to do, was injured on account of the drawhead and coupling pin not being suitable for the purposes for which they were to be used, he being ignorant thereof, and of the defective condition of the track." The statute of limitations being pleaded to the amendment, the court adjudged that it did not apply. The facts in the case before us do not seem to differ in any material respect from those in the *Case of Cox*, just referred to, so far as our decision must depend upon them. Here, as in the *Cox Case*, the original petition specified certain acts of negligence. The amended petition specified certain others which contributed to or concurred in producing the one injury complained of, namely, the death of Gray.

The Kentucky practice is quite as instructive and controlling. In *Greer* v. *Louisville & N. R. Co.* 94 Ky. 169, 21 S. W. 649, the only negligence alleged in the original petition related to the act of driving or operating the train. An amended petition was tendered, setting up as additional acts of negligence that the guard rail and coupling pin were defective. The inferior court refused to permit the filing of this amendment, which action of the court, under the Kentucky practice, was reviewable. The court of appeals held that it was error to refuse permission to file the amendment, upon the ground that the proposed amendment was not a departure, inasmuch as the cause of action was not changed, and as the alleged acts of negligence may all have concurred to cause the injury.

In *Smith* v. *Missouri P. R. Co.* 5 C. C. A. 557, 12 U. S. App. 426, 56 Fed. Rep. 458, it was held by the circuit court of appeals of the eighth circuit that "where, in an action against a railroad company for causing the death of an employee, the original petition proceeds entirely on the ground of the company's negligence in employing an engineer of known incompetence, an amendment which alleges that the engineer was negligent, and that he and the deceased were not fellow servants, does not introduce a new cause of action, but is only an amplification of the original one, and is a proper amendment."

The circuit court of appeals for the fifth circuit, in *Cross* v. *Evans*, 52 U. S. App. 720, 86 Fed. Rep. 6, 29 C. C. A. 523, distinctly held that the assignment of additional specifications of negligence in an amended petition does not create a new cause of action, so as to let in the plea of limitation. Under § 134 of the Kentucky Civil Code of Practice amendments are most liberally allowed to

promote the ends of justice, and we adhere to the view, already expressed, that the amended petitions filed in the case were but amplifications of the one cause of action.

It is not necessary to notice specifically the other grounds upon which the rehearing is asked.

The petition is dismissed.

CALIFORNIA SUPREME COURT.

EX PARTE Henry LORENZEN.

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

14. An unconstitutional attempt to enforce a private civil contract by penal legislation is not made by an ordinance providing that it shall be a misdemeanor for a passenger to give away or sell any street-railway transfer, since its primary object is to promote the convenience and welfare of the traveling public.

2. An ordinance intended to prevent or remedy an abuse of the transfer system is a legitimate exercise of the power expressly granted by Cal. Civ. Code, § 503, giving cities the right to make reasonable regulations for the operation and management of street railways.

3. An ordinance making it a penal offense for any person except a duly authorized conductor or agent of a street-railway company to issue, deliver, give, or sell any transfer, transfer check, or ticket issued, or purporting to be issued, by such company is not unconstitutional as an unlawful deprivation of property, since it interferes with no rights enjoyed by the passenger under his contract with the railway company, as the transfer is given to him for the purpose of enabling him to continue his journey, and is not transferable or assignable to another; nor is it a deprivation of the personal liberty guaranteed by U. S. Const. 14th Amend. § 1, and Cal. Const. art. 1, § 1.

4. The generality of the language of an ordinance making it a penal offense for any person except a duly authorized conductor or agent of a street-railway company to issue, deliver, give, or sell any transfer, transfer check, or ticket issued, or purporting to be issued, by such company, does not make the ordinance invalid on the ground that it is unreasonable and oppressive by making every person, however innocent, who shall hand a transfer to anyone other than the person authorized to receive it guilty of a misdemeanor, since the courts, in construing the ordinance, will look to its essence and spirit, and will apply it only to acts in their nature illegal or fraudulent.

(*Garoutte and Van Dyke, JJ., dissent.*)

(April 30, 1900.)

APPLICATION for a writ of habeas corpus to obtain the release of petitioner from custody to which he had been committed for violation of an ordinance forbidding the disposition of street-car transfers. *Petitioner remanded.*

The facts are stated in the opinion.

Messrs. **James G. Maguire** and **Frederick MacGregor** for petitioner.

Mr. **Peter F. Dunne**, for respondent:

The general term "persons," used in the ordinance, must be construed reasonably, but is not to be extended to every imaginable instance, however remote from the legislative intent, which may fall within the mere letter of the ordinance.

United States v. *Kirby*, 7 Wall. 482, 19 L. ed. 278; *Rutledge* v. *Crawford*, 91 Cal. 533, 13 L. R. A. 761, 27 Pac. 779; *Brewer* v. *Blougher*, 14 Pet. 178, 10 L. ed. 408; *Donnell* v. *State*, 2 Ind. 658; *State* v. *Clark*, 29 N. J. L. 96; *Pixley* v. *Western P. R. Co.* 33 Cal. 183, 91 Am. Dec. 623; *Holmes* v. *Paris*, 75 Me. 561; *Smith* v. *People*, 47 N. Y. 330; *Russell* v. *Farquhar*, 55 Tex. 359; *Electro-Magnetic Min. & Development Co.* v. *Van Auken*, 9 Colo. 204, 11 Pac. 80; *Brown* v. *Thompson*, 14 Bush, 538, 29 Am. Rep. 416; *Com.* v. *Adcock*, 8 Gratt. 661; *Taylor* v. *Taylor*, 10 Minn. 120, Gil. 81; *Doles* v. *Hilton*, 48 Ark. 368, 3 S. W. 193.

It is not necessary in the complaint to negative the "existence" not within the legislative intent.

United States v. *Kirby*, 7 Wall. 482, 19 L. ed. 278; *People* v. *West*, 106 N. Y. 297, 60 Am. Rep. 452, 12 N. E. 610.

The purpose or intent on the part of the person giving away a transfer is not a necessary part of the statutory offense.

People v. *West*, 106 N. Y. 297, 60 Am. Rep. 452, 12 N. E. 610; *Powell* v. *Pennsylvania*, 127 U. S. 678, 32 L. ed. 253, 8 Sup. Ct. Rep. 992, 1257; *People* v. *O'Brien*, 96 Cal. 177, 31 Pac. 45.

There is no incompatibility between the character of the same act as a breach of contract, and its character as a crime.

Re Debs, 158 U. S. 565, 39 L. ed. 1092, 15 Sup. Ct. Rep. 900.

There is no invasion by ordinance of right of property, having regard to the nature and purpose of the transfer.

Hibbard v. *New York & E. R. Co.* 15 N. Y. 466; *People* v. *West*, 106 N. Y. 297, 60 Am. Rep. 452, 12 N. E. 610.

The control of the subject-matter of transfers, within the lines of the ordinance, is justified by police power. Analogies are afforded by "scalpers' cases."

Burdick v. *People*, 149 Ill. 600, 24 L. R. A. 152, 36 N. E. 948; *Fry* v. *State*, 63 Ind. 552, 30 Am. Rep. 238; *Nashville, C. & St. L. R. Co.* v. *McConnell*, 82 Fed. Rep. 65; *State* v. *Corbett*, 57 Minn. 345, 24 L. R. A. 498, 4 In-

NOTE.—As to street-railway transfers, see also Heffron v. Detroit City R. Co. (Mich.) 16 L. R. A. 345; Pine v. St. Paul City R. Co. (Minn.) 16 L. R. A. 347; Mahoney v. Detroit Street R. Co. (Mich.) 18 L. R. A. 335; and O'Rourke v. Citizens' Street R. Co. (Tenn.) 46 L. R. A. 614.

ters. Com. Rep. 694, 59 N. W. 317; *Pensacola & A. R. Co.* v. *Florida*, 25 Fla. 310, 3 L. R. A. 661, 2 Inters. Com. Rep. 526; *New York Bd. of Trade & Transportation* v. *Pennsylvania R. Co.* 3 Inters. Com. Rep. 433.

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

The petitioner was convicted of the violation of a penal ordinance in the city and county of San Francisco. He sued out this writ of habeas corpus, alleging that the ordinance under which he was convicted and sentenced is void. The ordinance in question is as follows:

> Order No. 2992. Providing regulations in the operation of street railroads and prohibiting the issuance or delivery of transfers to passengers except upon or within the car from which the passenger is transferred.
>
> The people of the city and county of San Francisco do ordain as follows:
>
> Section 1. Every person, firm, and corporation operating street cars within the city and county of San Francisco that issue transfers to passengers to enable them to transfer to other cars operated by the same or different owner, shall issue and deliver said transfers upon or within the car from which the passenger is transferred, and not elsewhere.
>
> Sec. 2. Every person, firm, and corporation operating street cars within the city and county of San Francisco that receives transfers as fare from passengers shall take said transfers from the passengers who received the same within or upon the car to which the passengers are transferred, and not elsewhere.
>
> Sec. 3. No person, except a duly authorized conductor or agent of a person, firm, or corporation operating a line of street railroad within the city and county of San Francisco, shall within said city and county issue, deliver, give or sell, or offer to issue, deliver, give or sell, to any other person whatsoever, any transfer, transfer check, or ticket, issued or purporting to be issued by such person, firm, or corporation so operating such line of street railroad, for passage on any street railroad car or line.
>
> Sec. 4. Every person, firm, or corporation violating the provisions of this order shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine not exceeding five hundred dollars, or by imprisonment in the county jail not exceeding six months, or by both such fine and imprisonment.

Lorenzen was charged with having given and disposed of a transfer in violation of § 3 of the ordinance.

Against the validity of this ordinance it is urged that it violates the guaranty of personal liberty contained in the Constitutions of the United States and of the state of California (U. S. Const. Amend. 14, § 1; Cal. Const. art. 1, § 1); that it is an unconstitutional interference with a right of private property; that it is arbitrary, oppressive, and unreasonable; and finally, that it is an illegal attempt to enforce the obligations or assumed obligations of private civil contracts by penal legislation.

As to the nature of the "transfer," it is well recognized and admitted that the street railroads of the city and county of San Francisco have provided that passengers upon their cars who have paid the usual fare may receive transfers entitling them to leave the car at a certain designated point, and there, within a limited time, and without further payment of fare, but upon presentation and delivery of the transfer check, pursue their travels upon the connecting line. It is, then, a part of the passenger's contract with the company that he may thus transfer to and ride upon the connecting road. As conditions of this privilege, it is further a part of the contract that the passenger shall board the cars of the connecting line at a designated point, and within a time limit after the issuance to him of the transfer indicated by a punch mark upon its face, and that the transfer shall not be transferable or assignable to another, but, if used at all, shall be used by the person to whom it is issued. The paper slip or ticket designated a "transfer," when in the hands of the passenger, thus serves a twofold purpose: First, to the passenger, as an evidence of his contract by which he is entitled to continue his journey upon the connecting road; and, second, to the company, as a means of identification afforded to its conductors and servants, by which they may know that the passenger presenting the transfer is entitled to ride without further payment of fare. Such being the nature of the contract between the company and its passenger, consideration may be paid to the objections raised against the validity of this ordinance.

The power of the general legislature acting within constitutional limitations, to make penal an act theretofore indifferent or even innocent, may not be doubted. *People* v. *West*, 106 N. Y. 293, 60 Am. Rep. 452, 12 N. E. 610. This, however, is not a statute of the general legislature, but a municipal by-law; and while it is true that article 11, § 11, of the Constitution of this state expressly confers upon a city the power to make and enforce within its limits "all such local, police, sanitary, and other regulations as are not in conflict with general laws," this language is not to be construed as enlarging the powers which municipalities theretofore enjoyed in these respects, but it is merely an express grant of a power which formerly they possessed by implication. *People ex rel. Wilshire* v. *Newman*, 96 Cal. 607, 31 Pac. 564. The ordinance in question, then, is to be scanned and judged like any other municipal ordinance. So judging it, regard is to be had to the end sought to be accomplished, —whether that end be a reasonable one, and one within the powers of the municipality to accomplish; and regard is also to be had to the question whether the mode adopted to accomplish the end is itself reasonable or unreasonable. Street-car companies are public utilities, which are almost necessities to

our present mode of life. While in one aspect their ownership is private, and they are *operated for private gain, in another they are* servants of the people, and the lawmaking powers reserve and freely exercise the right to regulate and control them in their operations. It is upon the theory, and only upon the theory, that they may be operated for the public good, that a franchise permitting their existence may be given; and the power to pass reasonable regulations for their operation and management is expressly granted by § 503 of our Civil Code. It is strictly within the power of the municipal authorities of the city, and properly within the exercise of their duties, to pass any reasonable regulations affecting street-car lines, to remedy a threatened or actual interference with the comfort, convenience, and general welfare of the traveling public.

It is urged against this ordinance that it is an attempt by penal legislation to enforce a private civil contract; in other words, that it is an attempt to compel the passenger who has received his transfer to use it within the limits of his contract, and not to violate that contract by giving it to a person who may make improper use of it. Could it be perceived that this was the only purpose, or even the main purpose, of the ordinance in question, we should be inclined to hold that the objection was fatal, but we cannot perceive that its main object or design was to accomplish this result. Rather, we think it clear that its primary object is to protect and advance the convenience and welfare of the traveling public; for if, to the *legislative mind, an abuse of the transfer* system has grown up, the inevitable result of such unrestricted abuse must be one of two things,—either that transfers would be discontinued entirely, to the material injury of the community, or the transfer system would be hedged and safeguarded by onerous conditions and requirements for the protection of the company, which would work great inconvenience to the passengers. It was certainly right for the supervisors, if they saw or anticipated the existence of such an evil, to destroy or avert it by proper legislation tending to correct the abuse; and it is no objection to the validity of an ordinance designed for this purpose that it may incidentally tend to prevent frauds, and compel men honestly to abide by their contracts. It is concluded, therefore, upon this point, that the purpose of the legislation, to promote the convenience and welfare of the traveling public in regulating the business of the street-car companies of San Francisco in their dealings with their passengers, is legitimate, and within the scope of the powers expressly granted to the municipal authorities.

But are the means adopted to accomplish this end unreasonable or oppressive, or in violation of any constitutional rights of the citizen? It is here first insisted by petitioner that the transfer issued to him by the company is his property, and that an essential and inalienable right to the enjoyment of property is the right to sell, give it away, or otherwise dispose of it. This, however, is *but partially true. A man may not be de*prived of his property or of his property rights for any private considerations whatever, nor for considerations of public good, without compensation first made; but the legislature has the unquestioned right, and every day exercises it, of restricting the use to which private property may be put. As is said in *Burdick* v. *People*, 149 Ill. 600, 24 L. R. A. 152, 36 N. E. 948: "The franchises of railroads acting under charters or acts of incorporation are of a public nature, so far as the safety, convenience, and comfort of passengers are concerned. The reasonable regulations affecting the conduct of such public employments are fit subjects for legislative action. The lawmaking power may provide means for remedying such evils as in its opinion may exist in the management of these public agencies of transportation, and in doing so it may sometimes impose restrictions which are deemed to be necessary upon the use and enjoyment of property. A man is not deprived of his property unless it is taken away from him so that he is devested of his title and possession. To limit the use and enjoyment of property by legislative action is not to take it away from the owner, when the property whose use and enjoyment are so limited is invested in a business affected with a public use, or is used as an accessory in carrying on such business." But, aside from this, in the case of this ordinance it cannot be perceived that its terms limit or circumscribe any of the just and legal rights *which a passenger receiving a transfer* theretofore enjoyed. In receiving it, he took it under the conditions above set forth. It was a part of his contract that, if used, he alone would use it; and if he sold it or assigned it, or gave it to another, to the end that that other might use it, he clearly violated his contract, and put a fraud upon the company. A court will not hear with much patience one insisting upon his right to violate his contract and consummate a fraud. The ordinance in question, therefore, so far as the passenger is concerned, leaves him all the rights which theretofore he enjoyed under his contract, and interferes in no way with any legal or legitimate use which at any time he could have made of the transfer. At the most, so far as he is concerned, it has but made penal what before was illegal and against good morals.

Finally, it is urged against the ordinance that by the generality of its terms it is unreasonable and oppressive; that every person who, taking a transfer, shall hand it to anyone other than the person authorized to receive it, no matter how innocent the act may have been in fact or intent, is guilty of a misdemeanor. In illustration of the position it is said that if the conductor should give to the father traveling with his family three or four transfers, and he in turn should hand them over to his wife and children, he would at once become amenable to the ordinance; that so, too, would be the passenger

who handed his transfer to another upon the car, to be delivered to the conductor; so, too, would the witness in court who gave the transfer to the judge for inspection, or the judge who in turn might deliver it to the clerk. To some of the objections thus presented answer may be made that the life of the transfer ends with the passage of the time indicated upon its face. It ceases then to be a transfer,—to have any value at all other than that which may attach to it as a bit of paper. But for the more substantial objection that the ordinance, by its terms, would oppress and lead to the conviction of persons guilty of no fraudulent act, it is to be remembered that the letter of a penal statute is not of controlling force and that the courts, in construing such statutes, from very ancient times, have sought for the essence and spirit of the law, and decided in accordance with it, even against express language; and in so doing they have not found it necessary to overthrow the law, but have made it applicable to the class of persons or the kind of acts clearly contemplated within its scope. The rule was thus early expressed in Bacon's Abridgment [p. 250]: "A statute ought sometimes to have such an equitable construction as is contrary to the letter." The oft-cited instance of the Bologna law, which enacted that whoever drew blood in the streets should be punished with the utmost severity, was wisely held not to apply to the barber who opened the veins of a sick man to aid in his cure. The statute of Edward II., declaring guilty of a felony any person who broke prison, was held, upon considerations of the most ordinary common sense, not to apply to one who did so to escape from a burning jail. The law declaring it a felony to lay hands upon a priest, by the same principles of common-sense reasoning, was held not to apply to one who did so by way of kindness or warning, but only to those who acted with illegal or improper intent. In *United States* v. *Kirby*, 7 Wall. 482, 19 L. ed. 278, the act provided "that if any persons shall knowingly and wilfully obstruct or retard the passage of the mail, or of any driver or carrier," etc. ". . . for every such offense shall pay a fine not exceeding one hundred dollars." A mail carrier was arrested by a state officer on an indictment for murder. The act came within the letter of the law. Mr. Justice Field, delivering the opinion of the court, discusses the exemption of mail carriers from detention under civil process, but declares that they are liable to arrest and detention under criminal process for acts *mala in se*. Therefore, notwithstanding the fact the defendant had "knowingly and wilfully" retarded the mail carrier, it is said: "When the acts which create the obstruction are in themselves unlawful, the intention to obstruct will be imputed to their author, although the attainment of other ends may have been his primary object. The statute has no reference to acts lawful in themselves, from the execution of which a temporary delay to the mails unavoidably follows. . . . All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice or oppression or an absurd consequence. It will always therefore be presumed that the legislature intended exceptions to its language which would avoid results of this character. The reason of the law in such cases should prevail over its letter." In *Donnell* v. *State*, 2 Ind. 654, a statute prohibiting the retailing of spirituous liquors without license contained no exception in favor of a druggist selling for medicinal purposes. A druggist who had so sold liquor was discharged after conviction, as being clearly excepted from the intent, though not the letter, of the law. In *State* v. *Clark*, 29 N. J. L. 96, the statute made it a misdemeanor for anyone to wilfully open, break down, injure, or destroy any fence. It was held not to apply to the destruction of a fence by one who was in its lawful possession, and it is said that the literal import of the terms and phrases implied will be controlled by the objects which the act was designed to reach. In *Holmes* v. *Paris*, 75 Me. 559, it is said: "It has been repeatedly asserted in both ancient and modern cases that judges may in some cases decide upon a statute even in direct contravention of its terms." In all of these cases the apparent defect of the statute is cured by making it apply according to its spirit to the act in its nature illegal or fraudulent. So here, notwithstanding the generality of the language, no lawful or innocent use of the transfer would subject the passenger to the penalties of the ordinance. It is concluded, therefore, that the ordinance is valid, and *the prisoner is remanded.*

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

I dissent: **Van Dyke**, J.

Garoutte, J., dissenting:

I agree with a great many of the views expressed by Mr. Justice Henshaw, but must dissent from the conclusion declared, and from his construction of the ordinance, as evidenced by the language in the closing portion of his opinion, to wit: "In all of these cases the apparent defect of the statute is cured by making it apply according to its spirit to the act in its nature illegal or fraudulent. So, here, notwithstanding the generality of the language, no lawful or innocent use of the transfer would subject the passenger to the penalties of the ordinance." Stripped of immaterial matters, the ordinance declares all persons guilty of a misdemeanor, other than some agent of the company, who "should deliver, give, or sell, or offer to deliver, give, or sell, to any other person whatsoever a transfer." Now, the opinion says no innocent or lawful use of the transfer by the passenger would make him guilty of a misdemeanor. In other words, as construed by the opinion, the ordinance reads that any passenger "who gives away or sells a transfer, with intent that it shall be

used by some other party, is guilty of a misdemeanor." An ordinance so framed appears to me to be perfectly valid, but this court has no right to frame such an ordinance, even by construction. An ordinance of that kind would be entirely dissimilar to the one passed by the board of supervisors. In such an ordinance this particular intent becomes the very heart of the act, overshadowing everything else. How can this court say that the lawmaking body passed any such an ordinance? How can this court even say that such body intended to pass that kind of an ordinance? We only know what the intention of the board of supervisors was from what it did, and this court can only measure and test this act by what it says. According to the main opinion, a complaint against a passenger, worded in the language of this ordinance, would not charge an offense; for, as there said, a passenger might do all the things forbidden, and still be innocent. It thus appears that a complaint sufficient to sustain a cause of action must go beyond anything found in the ordinance, and allege that the passenger sold or gave away the transfer "with intent that it should be used by another person." There being no authority in the ordinance itself which justifies the pleader in inserting these words, he clearly has no right to do so. The opinion relies upon various decisions to support this liberal construction of the statute, notably an ancient and somewhat celebrated case which arose under the law of Bologna, —a law which read that "whoever drew blood in the streets should be punished with the utmost severity;" and it was there held that this law did not apply to the surgeon who in his professional capacity bled a sick man in the streets. I find no fault with the decision of that case, to the end that the surgeon was not guilty, but do dissent from the implication found in the opinion here,—that certain classes of persons could be legally convicted of violating a law so worded if found on our statute books. The indefiniteness of the penalty is only a fair illustration of the indefiniteness of the entire act. A law so worded is beyond all salvation by construction, and that case is not valuable as an authority here. For many reasons I am quite clear that such a law in these times would not stand the test of judicial scrutiny for a second. To support the validity of a law of that kind at the present time by construction would partake rather of the character of Solomonic justice, as administered by that great King in the celebrated trial of the title to the baby. I have a curiosity to know what decision would have been rendered by the Bologna court if some public-spirited citizen, similar to those we have in these days, for the purpose of testing this law had drawn blood in great quantities in the street by slashing the throat of a goat or an ox. If a question similar in principle to the one here presented came before the cadi who sits daily upon his mat in front of the opening of his tent, administering justice under the soothing fumes of his hookah, from whose decisions there is no appeal, and who acts as judge, jury, and attorney, untrammeled by legislatures and constitutions, I have no doubt but that he would enforce the ordinance, promptly declare the prisoner guilty, and probably affix the penalty at a fine of five goats and a heifer, and do it all within a few minutes; for he administers justice on very general principles, and makes the law fit the case. But the practice and procedure are different in this country. In the days when the Bologna case was decided, in that and similar jurisdictions such a thing as the invalidity of a law was not known. The power that made the law was supreme. Every law was a constitution unto itself, and woe betide the judge who would have the temerity to set it aside. His probable fate would be to be "punished with the utmost severity." Things in these days and in this country are not as they were in those days and in those countries. The Indiana case cited in the opinion, as to the selling of liquor, is opposed to the later case of *Com.* v. *Kimball*, 24 Pick. 370, where Chief Justice Shaw says: "If the law is more restrictive in its present form than the legislature intended, it must be regulated by legislative action." I fully indorse the doctrine of *United States* v. *Kirby*, 7 Wall. 482, 19 L. ed. 278, as to the stoppage of the United States mails. The court there said: "The statute of Congress by its terms applies only to persons who 'knowingly and wilfully' obstruct or retard the passage of the mail or of its carrier; that is, to those who know that the acts performed will have that effect, and perform them with the intention that such shall be their operation." I find nothing in that case supporting the construction given the ordinance in this case. And I venture to say that no case can be found where, by judicial construction, a specific particular intent has been placed in a statute. If by construction you may inject the words into this ordinance, "with intent that it shall be used," then it seems that the legislature has enacted a vast mass of useless legislation: for by the language of a hundred different sections of the Penal Code various acts are declared to be either felonies or misdemeanors, when done with a certain particular intent. If the certain intent may be supplied by construction, it was idle to insert in it these various sections. For example, § 356 of the Penal Code reads: "Every person who cuts out, alters, or defaces any mark made upon any log, lumber, or wood, or puts a false mark thereon, with intent to prevent the owner from discovering its identity, is guilty of a misdemeanor." In the absence of a particular intent in this statute, would the court legislate a certain intent into it? How would a court know what intent to insert? Naturally, I should have supposed the intent to be inserted in this statute would have been an intent to appropriate the "log, lumber, or wood." Yet not so, for the intent named is an intent "to prevent the owner from discovering its identity." It is thus plain that a court cannot do these things, for the reason, among many reasons, that it does not and cannot know what intent the legislature had in mind.

ILLINOIS SUPREME COURT.

Randall H. WHITE, *Appt.*,
v.
Milo H. WAGAR.

(185 Ill. 195.)

1. **Labels and trademarks are not the subject of forgery** at common law,—at least where the trademark or label cannot be made the basis for a suit against the alleged issuer for deceit or warranty.
2. **Statutory authority to issue search warrants** for forged bank notes or other forged instruments, or the tools, machinery, or materials for making them, does not include forged trademarks, labels, caps, corks, cases, bottles, or boxes, or the machinery for making them.
3. **A search warrant is void** which merely directs the bringing of the property before the officer who issued it, where the statute provides that the property and the person in whose possession it is found shall be brought.
4. **Certiorari lies** to review the action of a justice of the peace in issuing a search warrant not authorized by statute.

(April 17, 1900.)

APPEAL by defendant from a judgment of the Appellate Court, First District, affirming a judgment of the Circuit Court for Cook County annulling proceedings of defendant, a justice of the peace, in issuing a search warrant. *Affirmed.*

Statement by **Craig, J.**:

This is an appeal from a judgment of the appellate court affirming a judgment of the circuit court of Cook county, wherein the circuit court, upon the petition of Milo H. Wagar, the appellee, for a writ of certiorari as at common law, entered a judgment that "the record and proceedings brought before it in the case of the people of the state of Illinois against No. 265 Fifth avenue, Chicago, Cook county, Illinois, before Randall H. White, a justice of the peace in and for the town of South Chicago, in the county of Cook and state of Illinois, are manifestly illegal, erroneous, and void in law, and wholly without effect, and that such proceedings are hereby vacated, annulled, and set aside." Randall H. White, the appellant, was the justice of the peace before whom the judgment was rendered which was called in question by the petition for certiorari. The complaint made before the justice, as shown by the petition, was substantially as follows: "William M. Copeland, being duly sworn, upon his oath deposes and says that certain forged and counterfeit trademarks, labels, bottles, caps, corks, cases, boxes, dies, stamps, stencils, plates, names, and signatures, purporting to be the true and genuine trademarks, labels, bottles, caps, corks, cases, boxes, dies, stamps, stencils, plates, names, and signatures of James E. Pepper & Co., of Lexington, Kentucky; the same as to J. A. Gilka, of the city of Berlin, Germany; also, Dr. J. G. B. Siegert & Hijos, of Port of Spain, Island of Trinidad, British West Indies; John De Kuyper & Son, Rotterdam, Holland; Martell & Co., of Cognac, France; Benedictine Co., of Fecamp, France; W. A. Gaines & Co., of Frankfort, Kentucky; Coates & Co., Plymouth, England; Booth & Co., London, England; Martini & Rossi, Italy; Joseph F. Boll, of Isere, France; John Jameson & Son, Limited, Dublin, Ireland; G. H. Mumm & Co., Reims, France; Edward Pernod, Couvet, Switzerland; H. Underberg-Albrecht, Rheinberg, Germany; Field, Son & Co., of London, England; Louis Roederer, of Reims, France; Paris, Allen & Co., of New York City; Axel Bagge & Co., of Goteborg, Sweden; Jorgen B. Lysholm, of Throndhjem, Norway; John Ramsay, of Port Ellen, Islay, Scotland; L. Garnier, of France; E. H. Taylor, Jr., & Co., of Frankfort, Kentucky; Hiram Walker & Sons, Limited, of Canada; E. & J. Burke, Limited, of Dublin, Ireland; Cook, Bernheimer & Co., of New York City; also, certain tools, machinery, and printing presses, cuts, type, and other materials used for making the said forged and counterfeit trademarks, labels, bottles, caps, corks, cases, boxes, dies, stamps, stencils, plates, names, and signatures, which said forged and counterfeit trademarks, labels, bottles, caps, corks, cases, boxes, dies, stamps, stencils, plates, names, and signatures, and the tools, machinery, printing presses, cuts, type, and other materials for making the same, were forged and counterfeited, and used for the unlawful purpose of cheating and defrauding some person, body corporate, by some person or persons unknown to this affiant. And he verily believes that a large number of said forged and counterfeit trademarks, labels, bottles, caps, corks, cases, boxes, dies, stamps, stencils, plates, names, and signatures, and the tools, machinery, printing presses, type, cuts, and other materials for making the same, are now concealed in and about the building and premises of No. 265 Fifth avenue, and the basement connected therewith, all in the city of Chicago, county of Cook, and state of Illinois, and that the following are some of the reasons for such belief: First, that one of the agents of said affiant reports to him that he, said agent, saw shipped away from said premises on the 18th day of January, 1898, about twenty cases of counterfeit and bogus Martini & Rossi Vermouth, having stamped thereon forged marks and signatures purporting to be the true and genuine marks and signatures of Martini & Rossi, and also reports that he saw on said date a large number of forged and counterfeit cases, purporting to be the true and genuine cases of James Hennessy & Co., stored on said premises."

Upon the complaint so made the justice issued a warrant, which, among other things,

NOTE.—On the question, What may be the subject of forgery?—see *note* to People v. Munroe (Cal.) 24 L. R. A. 33; also the case of State v. Evans (Mont.) 28 L. R. A. 127, on the forgery of worthless instruments.

contained the following: "We therefore command you, with necessary and proper assistance, to enter in the daytime the said premises, and there diligently search for said goods and chattels, and, if the same or any part thereof be found on such search, that you bring the goods and chattels so found before the said justice, or, in case of his absence, before some other justice of the peace in said Cook county, to be disposed of according to law." The warrant was delivered to William Breen, a constable, and by him returned on January 20, 1898, with the following indorsement thereon:

Executed the within writ by searching the within-mentioned premises between sunrise and sunset of the 19th day of January, 1898, and taking therefrom articles found in the possession of M. H. Wagar, to wit: Fifty-two bottles alleged Hennessy brandy, having forged and counterfeit labels attached; twenty-three bottles alleged Chartreuse, having forged and counterfeit labels attached; one case alleged Angostura Bitters, pint bottles, as described in complaint; one case alleged Angostura Bitters, quart bottles, having forged and counterfeit labels, as shown in the complaint; one quart bottle alleged Angostura Bitters, having forged and counterfeit labels attached, as described in the complaint. Dated this 20th day of January, 1898. Costs and expenses, eight men and team, $20. William Breen, Constable.

The articles seized, in part, having been brought before the justice of the peace, a hearing was had, and the justice adjudged the labels, trademarks, names, and signatures attached to certain of the bottles so seized to be forged and counterfeit labels, trademarks, names, and signatures, and directed that said labels, trademarks, names, and signatures attached to said bottles so produced be safely kept by said William Breen so long as necessary, for the purpose of being produced or used in evidence on any trial, and, as soon as might be afterwards, to be burned or otherwise destroyed under the direction of the said justice of the peace, appellant herein, and that as to the other labels, trademarks, names, and signatures attached to the articles as mentioned in said constable's return, adjudged that each and all were forged and counterfeit labels, trademarks, names, and signatures attached to bottles, as alleged, and found upon appellee's premises.

Messrs. **Randall H. White,** *in propria persona,* and **Charlton & Copeland,** for appellant:

The writ of certiorari should not have been issued in this case.

Certiorari, as at common law, is an extraordinary proceeding in our practice, and is only allowable in cases where there is no other remedy, and where the injury or wrong complained of is irreparable and cannot be prevented or compensated for, save by prohibiting the inferior tribunal from proceeding further, and by setting aside and annulling the proceedings had therein.

Mason & T. Special Drainage Dist. Comrs. v. *Griffin,* 134 Ill. 340, 25 N. E. 995; *Hyslop* v. *Finch,* 99 Ill. 171; *Union Drainage Dist. Comrs.* v. *Volke,* 163 Ill. 243, 45 N. E. 415; *Ennis* v. *Ennis,* 110 Ill. 78; *People ex rel. Schuylerville & U. H. R. Co.* v. *Betts,* 55 N. Y. 600; *Hamilton* v. *Harwood,* 113 Ill. 154; *Doolittle* v. *Galena & C. Union R. Co.* 14 Ill. 381; *Scates* v. *Chicago & N. W. R. Co.* 104 Ill. 93; *Trustees of Schools* v. *Shepherd,* 139 Ill. 114, 28 N. E. 1073; *Wright* v. *Carrollton Highway Comrs.* 150 Ill. 138, 36 N. E. 980; *Harvey* v. *Dean,* 62 Ill. App. 41.

The common-law writ is not a writ of right, but issues only upon proper cause shown.

Trustees of Schools v. *School Directors,* 88 Ill. 100; *Mason & T. Special Drainage Dist. Comrs.* v. *Griffin,* 134 Ill. 330, 25 N. E. 995; *Board of Supers.* v. *Magoon,* 109 Ill. 142; *Lees* v. *Drainage Comrs.* 24 Ill. App. 487; *Chapman* v. *Dist. No. 3 Drainage Comrs.* 28 Ill. App. 17; *Hyslop* v. *Finch,* 99 Ill. 171.

The defendant may appeal from the judgment of the justice of the peace in criminal cases to the county or circuit court of the county.

Hurd (Ill.) Stat. chap. 79, § 172, p. 972; *Com.* v. *Gaming Implements,* 119 Mass. 332.

The petition or affidavit upon which the writ issues serves the purpose of an assignment of errors, and no irregularities will be considered except such as are pointed out therein, although they are apparent of record.

State v. *Kirby,* 5 N. J. L. 835; *Griffith* v. *West,* 10 N. J. L. 350; *New Jersey R. & Transp. Co.* v. *Suydam,* 17 N. J. L. 69.

By appearing and going to trial, irregularities in respect to the summons, defects in the warrant upon which the defendant was apprehended, and errors committed in adjourning the case, are waived.

Clifford v. *Overseer of Poor,* 37 N. J. L. 152.

The complaint was sufficient to give jurisdiction.

The property to be seized, considering its nature and use, was sufficiently described.

Dwinnels v. *Boynton,* 3 Allen, 310; *State* v. *Whiskey,* 54 N. H. 164.

The warrant did not command the officer to bring any person before the justice, but actual notice was given to appellee, and he responded in person and by his attorneys. What purpose would have been served by bringing him into court, that was not served by his coming as he did?

Tewalt v. *Irwin,* 164 Ill. 592, 46 N. E. 13; *Mason & T. Special Drainage Dist. Comrs.* v. *Griffin,* 134 Ill. 348, 25 N. E. 995; *Huston* v. *Clark,* 112 Ill. 350; *Miles* v. *Goodwin,* 35 Ill. 53; *Baldwin* v. *Murphy,* 82 Ill. 485; *Scott* v. *People,* 59 Ill. App. 112; *Schofield* v. *Pope,* 104 Ill. 130.

There is no property or property right in and to the sixteen forged and counterfeit labels detained by the order of the justice.

Langdon v. *People,* 133 Ill. 383, 24 N. E.

874; *Glennon* v. *Britton*, 155 Ill. 232, 40 N. E. 594.

Such articles are evidence belonging to the public and to the people, to be used against the person in whose possession they are found, in any trial growing out of a violation of the statutes prohibiting the possession of such articles.

State v. *Flynn*, 36 N. H. 64.

Forged labels, trademarks, names, and signatures are covered by the words "forged instruments," under division 8 of our Criminal Code.

Langdon v. *People*, 133 Ill. 382, 24 N. E. 874; *Boyd* v. *United States*, 116 U. S. 616, 29 L. ed. 746, 6 Sup. Ct. Rep. 524; *Com.* v. *Dana*, 2 Met. 329; *Glennon* v. *Britton*, 155 Ill. 232, 40 N. E. 594; *Atty. Gen.* v. *Boston Municipal Ct. Justices*, 103 Mass. 456; *Spalding* v. *Preston*, 21 Vt. 9, 50 Am. Dec. 68; *Thompson Lumber Co.* v. *Mutual F. Ins. Co.* 66 Ill. App. 261.

At common law, to constitute forgery the instrument need not be such as, if genuine, would be legally valid.

8 Am. & Eng. Enc. Law, p. 478; *Garmire* v. *State*, 104 Ind. 444, 4 N. E. 54; *Reed* v. *State*, 28 Ind. 306; *Shannon* v. *State*, 109 Ind. 407, 10 N. E. 87; *Com.* v. *Ray*, 3 Gray, 441.

Any writing in such form as to be the means of defrauding another may be the subject of forgery, or alterations in the nature of forgery.

8 Am. & Eng. Enc. Law, p. 478; *Berrisford* v. *State*, 66 Ga. 53; *Arnold* v. *Cost*, 3 Gill & J. 219, 22 Am. Dec. 302.

When a trademark or label can be made the basis of a suit against the alleged issuer in an action for deceit or warranty, then to falsely appropriate such a trademark or label is forgery.

Wharton, Crim. Law, 10th ed. § 690; *Reg.* v. *Smith*, 8 Cox, C. C. 32; *People* v. *Molins*, 7 N. Y. Crim. Rep. 61, 10 N. Y. Supp. 130; *Vogt* v. *People*, 59 Ill. App. 684; *Cohn* v. *People*, 149 Ill. 486, 23 L. R. A. 821, 37 N. E. 60.

When the precedent words exhaust a whole genus the general term is held to refer to a larger class.

McKeon v. *Wolf*, 77 Ill. App. 325; *Maxwell* v. *People*, 158 Ill. 254, 41 N. E. 905; *Langdon* v. *People*, 133 Ill. 382, 24 N. E. 874.

Messrs. **Collins & Fletcher** for appellee.

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

A justice of the peace in this state is a court of limited jurisdiction. It has and can exercise no powers except those conferred by the statute, and, whenever it assumes jurisdiction in a case not conferred by the statute, its acts are null and void. Moore, Justice, § 36, p. 18; *Robinson* v. *Harlan*, 2 Ill. 237; *Bowers* v. *Green*, 2 Ill. 42; *Evans* v. *Pierce*, 3 Ill. 468. It is also well settled that a justice of the peace has no jurisdiction to issue a search warrant except in cases provided by law. Moore, Crim. Law, § 141; Cooley, Const. Lim. 6th ed. 364. It therefore becomes important to determine what power has been conferred upon justices of the peace to issue search warrants. The authority to issue a search warrant in this state will be found in division 8 of chapter 38 of the Criminal Code, § 1 of which provides that a warrant may issue for stolen or embezzled goods. Section 2 provides that any judge or justice may, on like complaint made on oath, issue search warrants, when satisfied that there is a reasonable cause, in four instances: (1) "To seach for and seize counterfeit or spurious coin, forged bank notes and other forged instruments, or tools, machinery or materials prepared or provided for making either of them;" (2) obscene books; (3) lottery tickets, etc.; (4) gaming apparatus. The appellant, as we understand the argument, relies upon the following clause of the statute: "To seach for *and seize counterfeit or* spurious coin, forged bank notes and other forged instruments, or tools, machinery, or materials prepared or provided for making *either of them*,"—*as conferring* the power to issue the search warrant in question. The contention is that forged and counterfeit trademarks, labels, caps, corks, cases, bottles, boxes, dies, stamps, stencils, plates, names, and signatures, together with tools, machinery, printing presses, type, cuts, and other materials for making the same, are embraced within the meaning of the clause "other forged instruments," and it is insisted that the words "other forged instruments" are sufficiently comprehensive to include such articles. If, however, labels and trademarks are not properly embraced within the subject of forgery, then they will not fall within the designation of forged instruments. The weight of authority seems to be that labels and trademarks are not the subject of forgery at common law. In 2 Bishop, Crim. Law, 8th ed. § 536, the author says: In England it was the business of one Borwick to put up for the market, inclosed in printed wrappers, two kinds of powders, called, respectively, 'Borwick's Baking Powders' and 'Borwick's Egg Powders.' Another printed wrappers of his own, imitating these, and put in them his own powders, selling them as Borwick's. For this he was indicted as for forgery, but the judges deemed that, though he was probably criminally liable in another form, what he did came short of this offense. And plainly not so. In words employed by the learned judges, the genuine label put by Borwick upon his powders could not be deemed a writing of legal validity, however useful it was to him as an advertisement or a trademark. *Reg.* v. *Smith*, 8 Cox, C. C. 32, is a leading case on the question. In the decision of the case, Pollock, C. B., said: "The defendant may have been guilty of obtaining money under false pretenses. Of that there can be no doubt. But the real offense here was the issuing of a false wrapper, and inclosing false stuff within it. The issuing of this wrapper without the stuff within would be no offense. In the printing of these wrappers there is no forgery. The real offense is the issuing of them with the fraudulent matter in them. . . . They are

merely wrappers, and, in their present shape, I doubt whether they are anything like a document or instrument which is the subject of forgery at common law. To say that they belong to that class of instruments seems to me to be confounding things which are essentially different. It might as well be said that, if one tradesman used brown paper for wrappers of the same description as another tradesman, he could be accused of forging the brown paper." Justice Willes said: "This is not one of the different kinds of instruments which may be the subject of forgery. It is not made the subject of forgery simply by reason of the assertion of that which is false. In cases like the present the remedy is well known. The prosecutor may, if he pleases, file a bill in equity to restrain the defendant from using the wrapper, and he may also bring an action at law for damages, or he may indict him for obtaining money under false pretenses. But to convert this into the offense of forgery would be to strain the rule of law." As establishing a contrary doctrine, we have been referred to 8 Am. & Eng. Enc. Law, p. 480, where the author says: "The false writing of any instrument calculated to deceive, and which, if genuine, might subject the person signing it to damages, is forgery,—such as . . . trademark or label, where it can be made the basis of an action for deceit or warranty against the alleged issuer." In support of the doctrine announced, *Reg.* v. *Smith*, 8 Cox, C. C. 32, is cited; but, as has been seen, that case lays down a different rule. Wharton, Crim. Law, 10th ed. § 690, is also cited, where the author, in substance, says that, when a trademark or label can be made a basis for a suit against the alleged issuer in an action for deceit or warranty, then to falsely appropriate such trademark or label is forgery. But here, whether the trademarks or labels are of the character named by the author, so as to bring them within the rule indicated by him, does not appear from the proceedings before the justice. As we understand it, forgery, at common law, is the false making or materially altering, with intent to defraud, of any writing which, if genuine, might apparently be of legal efficacy, or a foundation of legal liability. 2 Bishop, Crim. Law, § 523. The trademarks and labels in question do not, as we understand it, fall within the definition indicated.

But it is argued that the articles mentioned in the complaint upon which the search warrant was issued may be and are included within the words of the statute "other forged instruments," and, hence, if the warrant is not authorized at common law, it is by statute. In *Shirk* v. *People*, 121 Ill. 61, 11 N. E. 888, following a well-established rule of the construction of statutes, it was held that under a statute making it criminal to make or pass a fictitious bill, note, or check, or other instrument in writing for the payment of money, the words "other instruments in writing" will only include such instruments as are of the same class or kind as those enumerated, such as money, bonds, due-bills, and other instruments in writing containing an absolute, unconditional promise or obligation to pay a sum of money or personal property. The same doctrine was reiterated in the late case of *Gundling* v. *Chicago*, 176 Ill. 340, 48 L. R. A. 230, 52 N. E. 44. The same rule was declared in *Cecil* v. *Green*, 161 Ill. 265, 32 L. R. A. 566, 43 N. E. 1105; and *Wilson* v. *Sanitary Dist.* 133 Ill. 443, 27 N. E. 203. See also *Sandiman* v. *Breach*, 7 Barn. & C. 99. *Langdon* v. *People*, 133 Ill. 382, 24 N. E. 874, has been cited as an authority sustaining appellant's position. There is, however, nothing in that case in conflict with the authorities above cited. There Langdon was indicted for forging the signature of a county judge, under § 114 of division 1 of the Criminal Code, which provides that "every person who shall . . . forge or counterfeit the signature of any public officer . . . shall be imprisoned in the penitentiary," etc.; and it was held that the words "other forged instruments" were broad enough to cover a forged certificate of a county judge. But there is a wide difference between an instrument containing the forged signature of a public officer, and trademarks and labels. A person found guilty of forging the former, under § 114 of division 1 of the Criminal Code, shall be imprisoned in the penitentiary not less than one year nor more than twenty years; but the falsification of the latter articles, under §§ 115 and 116, is not forgery, but a mere misdemeanor, for which a fine not exceeding $200 may be imposed. We find no provision of the Criminal Code that the simulation of trademarks and labels or names and signatures is forgery. They are not of the same class or kind as counterfeit or spurious coin and forged bank notes, and hence they cannot be regarded as forged instruments, within the meaning of the statute. In the *Langdon Case* the public document had been seized and taken from the possession of the defendant under a search warrant, and the vital question was whether it should be admitted in evidence; and in the decision of the case we held that, although papers may be illegally taken from the possession of a party against whom they are offered, it is no objection to their admissibility, if they are pertinent to the issue. The court will not take notice of how they were obtained. If, therefore, the statute did not authorize a search warrant for bogus trademarks, labels, names, and signatures, as we are satisfied it did not, the justice of the peace had no jurisdiction to issue a search warrant, and his action was void.

There is another fatal defect in the proceeding. The search warrant issued by the justice directed the officer to diligently search for the goods and chattels, and, if the same or any part thereof be found, to bring the same before the justice of the peace; but the warrant nowhere contains a direction that he shall also bring with him the person in whose possession the goods are found. Section 3 of division 8 of the Criminal Code (Hurd's Rev. Stat. 1897) expressly provides that the warrant shall direct the officer "to bring such stolen property or other things, when found, and the person in whose pos-

session they are found, to the judge or justice of the peace who issued the warrant." In Bishop, New Crim. Proc. § 243, the rule is laid down that a search warrant must contain every statutory requirement. In Cooley, Const. Lim. 6th ed. 369, it is said: "The warrant must also command that the goods or other articles to be searched for, if found, together with the party in whose custody they are found, be brought before the magistrate, to the end that, upon further examination into the facts, the goods, and the party in whose custody they were, may be disposed of according to law." In *State* v. *Leach*, 38 Me. 433, under a statute similar to ours, the supreme court of that state held that, where the warrant failed to require the officer to bring before the justice the person in possession of the goods seized, the proceeding was illegal and void. The fact that the person in possession of the articles did appear will not cure the difficulty. In a proceeding of this character, before the premises of the citizen may be invaded and searched, a strict observance of the requirements of the statute must appear from the proceeding itself; otherwise the proceeding will be void. *State* v. *Whalen*, 85 Me. 469, 27 Atl. 349.

It is, however, claimed in the argument that appellee had the right to appeal from the judgment of the justice, and, as the right of appeal existed, the writ of certiorari cannot issue. As no judgment was rendered against appellee, his right to appeal might well be doubted. But we shall not stop to consider that question, as this court has held in numerous cases that the common-law writ of certiorari may be awarded to all inferior tribunals and jurisdictions, where it appears that they have exceeded the limits of their jurisdiction, or in cases where they have proceeded illegally, and no appeal is allowed or other mode provided for reviewing their proceedings. *People ex rel. Loomis* v. *Wilkinson*, 13 Ill. 660; *Doolittle* v. *Galena & C. U. R. Co.* 14 Ill. 381; *Smith* v. *Highway Comrs.* 150 Ill. 385, 36 N. E. 967; *Hyslop* v. *Finch*, 99 Ill. 171. In the last case named it is said (p. 184): "There are two classes of cases in which, according to the previous decisions of this court, a common-law certiorari will lie: First, whenever it is shown that the inferior court or jurisdiction has exceeded its jurisdiction; second, whenever it is shown that the inferior court or jurisdiction has proceeded illegally, and no appeal or writ of error will lie."

The judgment of the Appellate Court will be affirmed.

INDIANA SUPREME COURT.

Frank D. BLUE, *Appt.*,
v.
Fannie M. BEACH *et al.*

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

1. **It is not necessary for the courts to decide** that vaccination is a preventive of smallpox, in order to sustain an order of a board of health, made in the exercise of powers conferred upon it, by which vaccination is made a condition of attending school, when there is danger of an epidemic of smallpox.
2. **The exclusion of unvaccinated pupils from the public schools**, in the absence of any express statute making vaccination compulsory, or imposing it as a condition upon the privilege of attending school, can be justified only as a public emergency, under rules and orders of the boards of health in the exercise of the general powers conferred upon them by statute, and cannot continue after the emergency ceases.
3. **The power granted to administrative boards** of the nature of boards of health, etc., to adopt rules, by-laws, and regulations reasonably adapted to carry out the purpose or object for which they are created, is not an improper delegation of legislative authority in violation of Const. art. 4, § 1.
4. **The statutory power of a board of health** to adopt and enforce rules and regulations necessary to preserve the public health, and to prevent the spread of contagious and infectious diseases, includes the power to exclude unvaccinated children from the public schools, when there is an emergency on account of the danger from smallpox.
5. **The exposure of a pupil to smallpox** is not a necessary condition of the right to exclude him from school until he is vaccinated, where the people in the community have been exposed to the disease.
6. **An unvaccinated pupil is not subjected to a penalty** by being excluded from public schools during danger of an epidemic of smallpox, under an order of the board of health.

(February 1, 1900.)

APPEAL by plaintiff from a judgment of the Circuit Court for Vigo County in favor of defendants in a proceeding to enjoin defendants from excluding plaintiff's son from the public schools. *Affirmed.*

The facts are stated in the opinion.

Messrs. **Stimson, Stimson, & Condit** and **A. M. Higgins** for appellant.

Mr. **Merrill Moores**, with *Messrs.* **W. A. Ketcham** and **William L. Taylor**, for appellees:

The merit of vaccination is one with which this court has nothing to do.

NOTE.—As to right to require compulsory vaccination, see Duffield v. Williamsport School Dist. (Pa.) 25 L. R. A. 152, and *note; Re* Smith (N. Y.) 28 L. R. A. 820; Bissell v. Davison (Conn.) 29 L. R. A. 251; State *ex rel.* Adams v. Burdge (Wis.) 37 L. R. A. 157; Potts v. Breen (Ill.) 39 L. R. A. 152; Morris v. Columbus (Ga.) 42 L. R. A. 175; and Wyatt v. Rome (Ga.) 42 L. R. A. 180.

Cleveland, C. C. & St. L. R. Co. v. *Backus*, 133 Ind. 542, 18 L. R. A. 729, 33 N. E. 421; *Hazen* v. *Strong*, 2 Vt. 432; *Jay County Comrs.* v. *Fertich*, 18 Ind. App. 1, 46 N. E. 699.

The powers of state boards of health have always been most liberally construed.

Boards of Health, 4 Am. & Eng. Enc. Law, 2d ed. p. 597; Parker & W. Public Health & Safety, § 79; *Gregory* v. *New York*, 40 N. Y. 279; *Gould* v. *Rochester*, 105 N. Y. 46, 12 N. E. 275; *State ex rel. Trenton Bd. of Health* v. *Hutchinson*, 39 N. J. Eq. 218; *Lake Erie & W. R. Co.* v. *James*, 10 Ind. App. 552, 35 N. E. 395, 38 N. E. 192; Prentice, Pol. Powers, p. 105; Tiedeman, Pol. Power, § 42.

It has always been held in Indiana that broad powers of legislation over local matters could be delegated by the general assembly to municipal boards, and that the common council and trustees of incorporated towns possess all powers of local legislation which may be delegated to them, the only limitation being the limitation of the grant itself.

Fertich v. *Michener*, 111 Ind. 480, 11 N. E. 605; *Indianapolis School Comrs.* v. *State ex rel. Sander*, 129 Ind. 34, 13 L. R. A. 147, 28 N. E. 61; *Sheehan* v. *Sturges*, 53 Conn. 481; Elliott, Railroads, § 678; *State ex rel. Railroad & Warehouse Commission* v. *Chicago, M. & St. P. R. Co.* 38 Minn. 281, 37 N. W. 782; *Chicago, M. & St. P. R. Co.* v. *Minnesota*, 134 U. S. 459, 33 L. ed. 982, 3 Inters. Com. Rep. 209, 10 Sup. Ct. Rep. 462, 702; *Interstate Commerce Commission* v. *Cincinnati, N. O. & T. P. R. Co.* 167 U. S. 479, 42 L. ed. 243, 17 Sup. Ct. Rep. 896; *Interstate Commerce Commission* v. *Detroit, G. H. & M. R. Co.* 167 U. S. 646, 42 L. ed. 310, 17 Sup. Ct. Rep. 310; *Woodruff* v. *New York & N. E. R. Co.* 59 Conn. 79; *Storrs* v. *Pensacola & A. R. Co.* 29 Fla. 622, 11 So. 226; *Atlantic Exp. Co.* v. *Wilmington & W. R. Co.* 111 N. C. 472, 18 L. R. A. 393, 4 Inters. Com. Rep. 294, 16 S. E. 393; *Georgia R. Co.* v. *Smith*, 70 Ga. 694; *Jasper County Comrs.* v. *Spitler*, 13 Ind. 237; *Lafayette, M. & B. R. Co.* v. *Geiger*, 34 Ind. 223; *Welch* v. *Boren*, 103 Ind. 255, 2 N. E. 722; *Farley* v. *Hamilton County Comrs.* 126 Ind. 468, 26 N. E. 174; *Eastman* v. *State*, 109 Ind. 278, 10 N. E. 97, 58 Am. Rep. 400; *Madison* v. *Abbott*, 118 Ind. 339, 21 N. E. 28; *State ex rel. Clark* v. *Haworth*, 122 Ind. 462, 7 L. R. A. 240, 23 N. E. 946; *Cleveland, C. C. & St. L. R. Co.* v. *Backus*, 133 Ind. 522, 18 L. R. A. 729, 33 N. E. 421.

Boards of health have power to make rules and regulations having the force of laws.

Salem v. *Eastern R. Co.* 98 Mass. 431, 96 Am. Dec. 650; *Milne* v. *Davidson*, 5 Mart. N. S. 409, 16 Am. Dec. 189; *Gregory* v. *New York*, 40 N. Y. 282; *Polinsky* v. *People*, 73 N. Y. 65; *People ex rel. Cox* v. *Special Sessions Ct. Justices*, 7 Hun. 214.

The state board of health, being a municipal corporation authorized to adopt rules and by-laws to prevent outbreaks and the spread of contagious and infectious diseases, would have the power to adopt by-laws or ordinances in the effectuation of this purpose, which would have the same force throughout the state which a city ordinance has throughout the corporate limits of the city.

Van Wormer v. *Albany*, 15 Wend. 263; *Meeker* v. *Van Rensselaer*, 15 Wend. 397; *Hart* v. *Albany*, 9 Wend. 571, 24 Am. Dec. 165.

That the power of the legislature to require vaccination, if deemed essential to public health, is within the police power, will not be disputed.

Champer v. *Greencastle*, 138 Ind. 351, 24 L. R. A. 768, 35 N. E. 14; *Townsend* v. *State*, 147 Ind. 624, 37 L. R. A. 294, 47 N. E. 19.

To say that the ordinance is unreasonable is not to deny its validity, if the city council had the right to ordain it.

Shea v. *Muncie*, 148 Ind. 14, 46 N. E. 140.

School authorities may exercise the power to make all reasonable rules and regulations for the health, good government, and proper instruction of the pupils, even without any statutory delegation whatever.

Fertich v. *Michener*, 111 Ind. 480, 11 N. E. 605; *Indianapolis School Comrs.* v. *State ex rel. Sander*, 129 Ind. 34, 13 L. R. A. 147, 28 N. E. 61; *Sheehan* v. *Sturges*, 53 Conn. 481.

California, New York, and Connecticut, and for that matter many other states, including Massachusetts, have enacted laws requiring vaccination.

Abeel v. *Clark*, 84 Cal. 226, 24 Pac. 383; *Bissell* v. *Davison*, 65 Conn. 183, 29 L. R. A. 251, 32 Atl. 348; *Re Walters*, 65 N. Y. S. R. 479, 32 N. Y. Supp. 322; *Duffield* v. *Williamsport School Dist.* 162 Pa. 476, 25 L. R. A. 152, 29 Atl. 742; *Re Rebenack*, 62 Mo. App. 8; *State* v. *Nelson*, 66 Minn. 166, 34 L. R. A. 318, 68 N. W. 1066.

The right to enforce vaccination is derived from necessity.

Morris v. *Columbus*, 102 Ga. 792, 42 L. R. A. 175, 30 S. E. 850; *State* v. *Nelson*, 66 Minn. 166, 34 L. R. A. 318, 68 N. W. 1066; *Gaines* v. *Waters*, 64 Ark. 609, 44 S. W. 353; *Hurst* v. *Warner*, 102 Mich. 244, 26 L. R. A. 484, 60 N. W. 440.

Very broad powers to make rules and regulations may be conferred upon administrative boards similar to the board of health.

State ex rel. Port Royal Min. Co. v. *Hagood*, 30 S. C. 519, 3 L. R. A. 841, 9 S. E. 686; *People* v. *Dunn*, 80 Cal. 214, 22 Pac. 140; *Territory ex rel. Smith* v. *Scott*, 3 Dak. 407, 20 N. W. 401; *State ex rel. Atty. Gen.* v. *McGraw*, 13 Wash. 319, 43 Pac. 176; *Carson* v. *St. Francis Levee Dist.* 59 Ark. 530, 27 S. W. 590; *Martin* v. *Witherspoon*, 135 Mass. 175; *State ex rel. Atwood* v. *Hunter*, 38 Kan. 583, 17 Pac. 177; *Opinion of Justices*, 138 Mass. 601; *People ex rel. Akin* v. *Kipley*, 171 Ill. 44, 41 L. R. A. 775, 49 N. E. 229; *People* v. *Brooks*, 101 Mich. 98, 59 N. W. 444; *State* v. *Barringer*, 110 N. C. 528, 14 S. E. 781; *People* v. *Long Island R. Co.* 134 N. Y. 506, 31 N. E. 873; *Interstate Commerce Commission* v. *Alabama Midland R. Co.* 168 U. S.

144, 42 L. ed. 414, 18 Sup. Ct. Rep. 45; *Chicago, B. & Q. R. Co.* v. *Jones*, 149 Ill. 380, 24 L. R. A. 141, 4 Inters. Com. Rep. 683, 37 N. E. 247; *New York & N. E. R. Co.* v. *Bristol*, 62 Conn. 527, 26 Atl. 122; *People* v. *Delaware & H. Canal Co.* 32 App. Div. 120, 52 N. Y. Supp. 850; *Railroad Comrs.* v. *Portland & O. Cent. R. Co.* 63 Me. 269, 18 Am. Rep. 208; *Field* v. *Clark*, 143 U. S. 649, 36 L. ed. 294, 12 Sup. Ct. Rep. 495; *Re Kollock*, 165 U. S. 526, 41 L. ed. 813, 17 Sup. Ct. Rep. 444; *Prather* v. *United States*, 9 App. D. C. 87; *United States* v. *Ford*, 50 Fed. Rep. 467; *United States* v. *Breen*, 40 Fed. Rep. 402; *United States* v. *Ormsbee*, 74 Fed. Rep. 207; *United States* v. *Moline*, 82 Fed. Rep. 592; *Caha* v. *United States*, 152 U. S. 218, 38 L. ed. 417, 14 Sup. Ct. Rep. 513; *Rumsey* v. *New York & N. E. R. Co.* 130 N. Y. 88, 28 N. E. 763; *Fitzgerald* v. *State* (Tex.) 9 S. W. 150.

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

Appellant, Frank D. Blue, instituted this action to enjoin the appellees, Fannie M. Beach and Orville E. Connor (the former being a teacher, and the latter the superintendent, of a graded public school in the city of Terre Haute), from excluding his son, Kleo Blue, from attending said school. The complaint, *inter alia*, discloses that appellant (plaintiff below) is a resident taxpayer of the city of Terre Haute, Vigo county, Indiana, and is the father of said Kleo Blue, and that the latter is a well and healthy child, between the ages of six and twenty-one years, unmarried, residing with his father in the school district wherein the school of which appellees are in charge is situated. The complaint further charges that the defendants have excluded said Kleo from the said public school, and are threatening to prevent his further attendance as a pupil therein. Appellees filed an answer in three paragraphs; the first being a general denial, which subsequently was withdrawn. By the second paragraph they sought to justify the act of which appellant complained, upon the facts therein alleged and set forth,—that there was an exposure to, and danger of an epidemic of, the disease of smallpox within the limits of the city of Terre Haute, and that the board of health of the state of Indiana had in 1891, in pursuance to law, made, adopted, and published a certain rule or by-law, numbered 11, and, further, that the legally organized and constituted board of health of said city had made and adopted a certain order. The latter, together with the above-mentioned rule of the state board of health, is incorporated in, and made a part of, the answer. It is then further alleged that, in pursuance to and in accordance with said order of the local board of health, the secretary thereof had notified and directed the board of school trustees of said city, together with the superintendent of its public schools, not to allow or permit any person whatever to attend such schools unless he or she had been vaccinated. In pursuance of said order of the board of health, and the notice given by said health officer, said superintendent of schools directed appellees not to allow or permit any person whatever to attend the public school mentioned in the complaint unless such person had been vaccinated. In pursuance of such order and directions, appellees notified appellant, and also notified his son, Kleo Blue, that unless the latter was vaccinated he would not be permitted to attend said school as a pupil. Appellant failed and refused to have his son vaccinated, and the son also refused to be vaccinated; and by reason of the order and directions aforesaid, it is alleged, appellees refused to permit him to attend said school. The third paragraph of the answer is substantially the same as the second, except that it sets out and incorporates therein an ordinance of the city of Terre Haute, adopted in 1881, whereby the board of health of said city was created and invested with certain specified powers. Rule 11 of the state board of health, in force at and prior to the time of the order made by the local health board, and made a part of the answer, is as follows: "In all cases where an exposure to smallpox is threatened, it shall be the duty of the board of health, within whose jurisdiction such exposure shall have occurred, or danger of such an epidemic ensuing, to compel a vaccination or revaccination of all exposed persons. All vaccinations must be made with non-humanized virus. The only exception to this rule that is recognized by this board is in the event that smallpox is prevalent in epidemic form, and the health officer should certify to the impossibility of obtaining such virus in sufficient quantity, and also as to the purity of the humanized virus to be used in lieu of the bovine virus." The order made by the local board of health, and made a part of the answer, is as follows: "Whereas, there has been and is an exposure to, and a danger of an epidemic of, smallpox within the city limits of the city of Terre Haute, Indiana; and whereas, vaccination is the only preventive of the disease of smallpox, and the only preventive of the same becoming an epidemic; and whereas, it is dangerous to allow and permit persons to attend the public schools within the limits of said city without being vaccinated: Therefore, be it adjudged, decreed, and ordered that there has been and is an exposure to, and danger of an epidemic of, smallpox within the limits of said city of Terre Haute, and that it is dangerous, and would cause an exposure to and an epidemic of smallpox in said city, to allow and permit persons to attend public schools within said city without being vaccinated, therefore no persons shall be allowed or permitted to attend any public school within the limits of said city without first being vaccinated according to law; and be it further ordered that the secretary of this board notify the board of school trustees and the superintendent of the public schools of this order and judgment." The ordinance, pertaining to the board of health, adopted by the common council of the city of Terre Haute in December, 1881, which, as

previously stated, was made a part of the third paragraph of the answer, among other things, provides as follows: "The board of health, hereby established, shall have general supervision of the sanitary condition of the city, and is hereby invested with power to establish and enforce such rules and regulations as they may deem necessary to promote, preserve, and secure the health of the city and to prevent the introduction and spreading of contagious, infectious, or pestilential diseases." A demurrer was overruled to each paragraph of the answer, and plaintiff replied in seven paragraphs, the first of which is a general denial. The second paragraph of the reply set out several rules adopted by the state board of health. The fourth alleged that the local board of health, in addition to the order mentioned in the answer, had by another rule excepted all children from said order who presented a certificate from a physician to the effect that they were in feeble health, or were subject to scrofulous or other blood diseases. The sixth paragraph merely averred that a local board of health had been organized under an ordinance adopted by the city of Terre Haute by virtue of the provisions of the general law of the state of Indiana. By the third paragraph of reply it was sought to show that, at the time plaintiff's son was excluded from the school in question, the danger of an epidemic of smallpox in the city of Terre Haute had passed away. By the fifth paragraph it is averred that there had been no exposure to smallpox in the city of Terre Haute, and that but one case had been reported as existing in the state, which was at the city of Muncie. By the seventh paragraph plaintiff alleged and sought to show that vaccination in all cases produced a loathsome constitutional disease, which poisoned the blood of the patient, and frequently resulted in death, and that vaccination was not a preventive of smallpox. A demurrer was sustained to the second, fourth, and sixth paragraphs of the reply, and overruled as to the third, fifth, and seventh. Upon the issues joined, there was a trial by the court, which resulted in a judgment in favor of appellees.

The evidence is not in the record, and appellant seeks a reversal of the judgment below upon the ruling of the court in holding the answer sufficient upon demurrer, and in sustaining the demurrer to the second, fourth, and sixth paragraphs of reply. The contention of appellant's learned counsel is that each paragraph of the answer is bad, and that the facts and matters therein disclosed will not justify the appellees in excluding appellant's son from the public schools. Their insistence may be said to embrace the following propositions: First. The exclusion of a pupil from the public schools of this state, who is "well and healthy," as the complaint discloses was the condition of Kleo Blue, and where there has been no exposure to the infection of smallpox, cannot be sustained merely because such pupil refuses to be vaccinated. Second. The right of appellant's son, under the facts shown by the complaint, to attend the public school in question, is guaranteed by the Constitution, and the qualifications necessary to the exercise of this privilege are prescribed by statute; and, as there is no statute providing that vaccination of a pupil shall become a condition precedent to this privilege, hence it is contended that the order made by the local board of health was without authority of law. Third. It is further insisted that rules or by-laws adopted by the state board and local boards of health do not have the force of laws within their respective jurisdictions, and that the power of the state board to adopt a by-law or rule of the nature of rule 11 is legislative. Therefore, under article 4, § 1, of the state Constitution, whereby all legislative authority is lodged in the general assembly, the power to make such rules cannot be delegated by it to boards of health.

Appellant, in the course of his argument, strenuously insists that vaccination is in no manner a preventive of smallpox, and that its failure in this respect is, as he contends, now conceded by many eminent medical authorities. In the objections which he urges against vaccination, he, to an extent, at least, proceeds upon the assumption that the person who is subjected thereto will thereby have his system so poisoned by the vaccine virus as to result in his permanent injury. It is true that bad results may, and possibly do, follow from the use of impure virus, or when the system of the patient is itself in a diseased condition; but that such is the result in all cases where pure virus is used, and proper care and skill are exercised, is certainly nothing more than mere assumption. With equal force it might be asserted that in all cases of the amputation of a limb, by a skilful and experienced surgeon, the death of the patient will necessarily follow as a result of the operation. We may say, however, in answer to the contention of appellant upon this feature of the case, that our decision herein does not in any manner, under the circumstances, depend upon the proposition that vaccination is a preventive of smallpox. In addition to the argument advanced by appellant, we have been fully supplied, during the pendency of this appeal, with many circulars and other documents denying the efficacy of vaccination. With the wisdom or policy of vaccination, or as to whether it is or is not a preventive of the disease of smallpox, courts, in the decision of cases like the one at bar, have no concern. It is a question, it is true, about which eminent medical men differ,—a large majority of whom, however, affirm that it serves as a preventive of, or a protection against, this dread scourge, which Macaulay denominated "the most terrible of all ministers of death." The question is one which the legislature or boards of health, in the exercise of the powers conferred upon them, must in the first instance determine, as the law affords no means for the question to be subjected to a judicial inquiry or determina-

tion. Consequently, in our holding in this appeal, it cannot be said that we affirm the arguments of those who disbelieve in the efficacy of vaccination, or that we deny the arguments of those who assert that it is a failure, and an outrage upon personal liberty. With this statement, we pass to the consideration of the real question involved.

There is no express statute in this state making vaccination compulsory, or imposing it as a condition upon the privilege of children attending our public schools; and, in the absence of such a law, the act of appellees in excluding Kleo Blue from the public schools in question must, under the facts, be justified, if at all, as a public emergency, under the rules and orders of the respective boards of health as set out in the answer. In 1891 the legislature of this state passed a statute creating and establishing a state board of health, and investing it with certain powers. See Burns's Rev. Stat. 1894, §§ 6711 *et seq.* By § 5 of the original act (Burns's Rev. Stat. § 6715), this board is expressly authorized and empowered to adopt "rules and by-laws, subject to the provisions of this act and in harmony with other statutes in relation to the public health, to prevent outbreaks and the spread of contagious and infectious diseases." Section 6718 provides that it shall be the duty of local boards of health to protect the public health by the removal of causes of disease, when known, and in all cases to take prompt action to arrest the spread of contagious diseases, to abate and remove nuisances dangerous to the public health, and to perform such other duties as may from time to time be required of them by the state board of health, pertaining to the health of the people. By § 6719 it is provided that "it shall be the duty of county boards of health to promulgate and enforce all rules and regulations of the state board of health, in their respective counties, which may be issued from time to time for the preservation of the public health and for the prevention of epidemic and contagious diseases. And the secretary of any board of health, who shall fail or refuse to promulgate and enforce such rules and regulations, and any person or persons, or the officers of any corporation who shall fail or refuse to obey such rules and regulations, shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined in any sum not exceeding one hundred dollars, and upon a second conviction the court or jury trying the cause may add imprisonment in the county jail, for any period not exceeding ninety days." By § 6725 the governor of the state is empowered to draw a warrant upon the state's treasury for money, in any sum not exceeding $50,000, to be expended in preventing the introduction into the state, and the spread, of cholera and other contagious and infectious diseases. Under the general law, by which the city of Terre Haute is governed, the legislature expressly conferred upon its common council the power to establish a board of health, and to invest it with the necessary power to attain its object. This power the common council of that city seems to have exercised by establishing a board of health, under the ordinance of 1881, and investing it with authority to make and enforce such rules and regulations as the board might deem necessary "to promote, preserve, and secure the health of the city, and to prevent the introduction and spreading of contagious, infectious, or pestilential diseases." Rule 11 of the state board of health, which appears to have been adopted and promulgated in 1891, soon after the organization of that board, provides, as we have seen, that, in all cases where an exposure to smallpox is threatened, it shall be the duty of the board of health within whose jurisdiction such exposure shall have occurred, or danger of such epidemic ensuing, to compel the vaccination or revaccination of all exposed persons. Pursuant to this rule, and in the exercise of the powers with which it was generally invested, this local board, after expressly finding that there had been and was an exposure to and danger of an epidemic of smallpox within the limits of the city of Terre Haute, made and promulgated the order in controversy, to the effect that no person be allowed to attend the public schools of that city without being vaccinated. In obedience to this order, it appears, the superintendent of the city's public schools directed appellees not to permit any person to attend the school over which they were in charge unless such person had been vaccinated. That the rule or by-law adopted by the state board of health, and the order of the local board, were each intended to secure and protect the public health, by preventing the spread, in its virulent form, of the contagious and loathsome disease of smallpox, there certainly can be no doubt. That the preservation of the public health is one of the duties devolving upon the state, as a sovereign power, cannot be successfully controverted. In fact, among all of the objects to be secured by governmental laws, none is more important than the preservation of the public health; and an imperative obligation rests upon the state, through its proper instrumentalities or agencies, to take all necessary steps to promote this object. This duty finds ample support in the police power, which is inherent in the state, and one which the latter cannot surrender. In the case of *State* v. *Gerhardt*, 145 Ind. 439, 33 L. R. A. 313, 44 N. E. 469, on page 451 of the opinion, and page 473, 44 N. E., in speaking in reference to the police power, it is said: "The police power of a state is recognized by the courts to be one of wide sweep. It is exercised by the state in order to promote the health, safety, comfort, morals, and welfare of the public. The right to exercise this power is said to be inherent in the people in every free government. It is not a grant derived from or under any written constitution. It is not, however, without limitation, and it cannot be invoked so as to invade the fundamental rights of a citizen. As a general proposition, it may be asserted that it is the province of the legis-

lature to decide when the exigency exists for the exercise of this power, but as to what are the subjects which come within it is evidently a judicial question." See also *Champer* v. *Greencastle*, 138 Ind. 339, 24 L. R. A. 768, 35 N. E. 14.

In order to secure and promote the public health, the state creates boards of health, as an instrumentality or agency for that purpose, and invests them with the power to adopt ordinances, by-laws, rules, and regulations necessary to secure the objects of their organization. While it is true, that the character or nature of such boards is administrative only, still the powers conferred upon them by the legislature, in view of the great public interest confided to them, have always received from the courts a liberal construction; and the right of the legislature to confer upon them the power to make reasonable rules, by-laws, and regulations is generally recognized by the authorities. Parker & W. Public Health & Safety, § 79; 4 Am. & Eng. Enc. L. 2d ed. p. 597; *Lake Erie & W. R. Co.* v. *James*, 10 Ind. App. 550, 35 N. E. 395, and 38 N. E. 192. When these boards duly adopt rules or by-laws by virtue of legislative authority, such rules and by-laws, within the respective jurisdictions, have the force and effect of a law of the legislature; and, like an ordinance or by-law of a municipal corporation, they may be said to be in force by authority of the state. *Salem* v. *Eastern R. Co.* 98 Mass. 431, 96 Am. Dec. 650; *Metropolitan Bd. of Health* v. *Heister*, 37 N. Y. 661; *Gregory* v. *New York*, 40 N. Y. 273; *Polinsky* v. *People*, 73 N. Y. 65; *Dingley* v. *Boston*, 100 Mass. 544; *Swindell* v. *State ex rel. Maxey*, 143 Ind. 153, 168, 35 L. R. A. 50, 42 N. E. 528; *People ex rel. Cox* v. *Special Sessions Ct. Justices*, 7 Hun, 214; Parker & W. Public Health & Safety, § 85; 4 Am. & Eng. Enc. Law, 2d ed. p. 599. It is true that such rules and by-laws must be reasonable, and boards of health cannot enlarge or vary, by the operation of such rules, the powers conferred upon them by the legislature; and any rule or by-law which is in conflict with the state's organic law, or antagonistic to the general law of the state, or opposed to the fundamental principles of justice, or inconsistent with the powers conferred upon such boards, would be invalid. Parker & W. Public Health & Safety, § 86. As a general proposition, whatever laws or regulations are necessary to protect the public health and secure public comfort is a legislative question, and appropriate measures intended and calculated to accomplish these ends are not subject to judicial review. But nevertheless such measures or means must have some relation to the end in view, for, under the mere guise of the police power, personal rights and those pertaining to private property will not be permitted to be arbitrarily invaded by the legislative department; and consequently its determination, under such circumstances, is not final, but is open to review by the courts. If the legislature, in the interests of the public health, enacts a law, and thereby interferes with the personal rights of an individual,—destroys or impairs his liberty or property,—it then, under such circumstances, becomes the duty of the courts to review such legislation, and determine whether it in reality relates to, and is appropriate to secure, the object in view; and in such an examination the court will look to the substance of the thing involved, and will not be controlled by mere forms. *Re Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636; *Weil* v. *Ricord*, 24 N. J. Eq. 169. It is affirmed by the authorities, as a general proposition or rule, that no one has a right to do any act which will cause injury to the health of another, or which will disturb his bodily comfort. Still, this right of security to health or comfort cannot remain absolute in a state of organized society, but is sometimes required to give way to the demands of trade or other vital public interests. Tiedeman, Pol. Power, § 16. It cannot be successfully asserted that the power of boards of health to adopt rules and by-laws subject to the provisions of the law by which they are created, and in harmony with other statutes in relation to the public health, in order that the "outbreak and spread of contagious and infectious diseases" may be prevented, is an improper delegation of legislative authority, and a violation of article 4, § 1, of the Constitution. It is true, beyond controversy, that the legislative department of the state, wherein the Constitution had lodged all legislative authority, will not be permitted to relieve itself of this power by the delegation thereof. It cannot confer on any body or person the power to determine what the law shall be, as that power is one which only the legislature, under our Constitution, is authorized to exercise; but this constitutional inhibition cannot properly be extended so as to prevent the grant of legislative authority to some administrative board or other tribunal to adopt rules, by-laws, or ordinances for its government, or to carry out a particular purpose. It cannot be said that every grant of power to executive or administrative boards or officials, involving the exercise of discretion and judgment, must be considered a delegation of legislative authority. While it is necessary that a law, when it comes from the lawmaking power, should be complete, still there are many matters relating to methods or details which may be by the legislature referred to some designated ministerial officer or body. All of such matters fall within the domain of the right of the legislature to authorize an administrative board or body to adopt ordinances, rules, by-laws, or regulations in aid of the successful execution of some general statutory provision. Cooley, Const. Lim. 114. The rule in respect to the delegation of legislative power is admirably stated in *Locke's Appeal*, 72 Pa. 491, 13 Am. Rep. 716, as follows: "Then the true distinction, I conceive, is this: The legislature cannot delegate its power to make a law, but it can make a law to delegate a power to determine some fact or state of things upon which the

law makes, or intends to make, its own action depend. To deny this would be to stop the wheels of government. There are many things, upon which wise and useful legislation must depend, which cannot be known to the lawmaking power, and must therefore be a subject of inquiry and determination outside of the halls of legislation." That the power granted to administrative boards, of the nature of boards of health, etc., to adopt rules, by-laws, and regulations reasonably adapted to carry out the purpose or object for which they are created, is not an improper delegation of authority, within the meaning of the constitutional inhibition in controversy, is no longer an open question, and is well settled by a long line of authorities. See *Jasper County Comrs.* v. *Spitler*, 13 Ind. 235; *Welch* v. *Bowen*, 103 Ind. 252, 2 N. E. 722; *Madison* v. *Abbott*, 118 Ind. 337, 21 N. E. 28; *Farley* v. *Hamilton County Comrs.* 126 Ind. 468, 26 N. E. 174; *Eastman* v. *State*, 109 Ind. 278, 10 N. E. 97; *State ex rel. Clark* v. *Haworth*, 122 Ind. 462, 7 L. R. A. 240, 23 N. E. 946; *Cleveland, C. C. & St. L. R. Co.* v. *Backus*, 133 Ind. 523, 18 L. R. A. 729, 33 N. E. 421; *State ex rel. Railroad & Warehouse Commission* v. *Chicago, M. & St. P. R. Co.* 38 Minn. 281, 37 N. W. 782; *Chicago, M. & St. P. R. Co.* v. *Minnesota*, 134 U. S. 418, 33 L. ed. 970, 10 Sup. Ct. Rep. 462, 702; *Interstate Commerce Commission* v. *Cincinnati, N. O. & T. P. R. Co.* 167 U. S. 479, 42 L. ed. 243, 17 Sup. Ct. Rep. 896; *Woodruff* v. *New York & N. E. R. Co.* 59 Conn. 63, 20 Atl. 17; *Storrs* v. *Pensacola & A. R. Co.* 29 Fla. 617, 11 So. 226; *Atlantic Exp. Co.* v. *Wilmington & W. R. Co.* 111 N. C. 463, 18 L. R. A. 393, 4 Inters. Com. Rep. 294, 16 S. E. 393; *State ex rel. Port Royal Min. Co.* v. *Hagood*, 30 S. C. 519, 3 L. R. A. 841, 9 S. E. 686; *Field* v. *Clark*, 143 U. S. 649, 36 L. ed. 294, 12 Sup. Ct. Rep. 495.

It would seem that the power of the boards of health of this state, under the laws relating thereto, to make and adopt all reasonable by-laws, rules, and regulations to carry out and effectuate the great interests of the public health confided to them by the legislature, is so well affirmed by the authorities that we may dismiss this feature of appellant's contention without further consideration. In the light of the firmly-settled principles of the law to which we have referred, we may proceed, under the facts, to test thereby the acts of appellees in excluding Kleo Blue from school.

Under the ordinance of the city's common council establishing the local board of health, the latter was, as we have seen, invested with power to adopt and enforce such rules and regulations as it might deem necessary to secure, promote, and preserve the public health, and to prevent the spread of contagious and infectious diseases. By the provisions of the statute creating the state board of health, the imperative duty to protect the public health by the removal of causes of diseases when known, and to take prompt action to arrest the spread of contagious diseases, and to perform such other duties as may from time to time be required by the state board, are expressly enjoined upon all local health boards. It is certainly evident that the health board of the city of Terre Haute, regardless of the rule of the state board, had, under the law, ample power to protect the public health, and to prevent the spread of contagious and infectious diseases, and for such purposes had the right to adopt such appropriate and reasonable means or methods as its judgment dictated. This being true, and an emergency on the account of danger from smallpox having arisen, and the board believing, as we may assume, that the disease would spread through the public schools, and further believing that it would be prevented, or its bad effects lessened, by the means of vaccination, and thereby afford protection to the pupils of such schools and the community in general, it would certainly have the right, under the authority with which it was invested by the state, to require, during the continuance of such danger, that no unvaccinated child be allowed to attend the public schools; or the board might, under the circumstances, in its discretion, direct that the schools be temporarily closed during such emergency, regardless of whether or no the pupils thereof refused to be vaccinated. If vaccination was the most effective means of preventing the spread of the disease through the public schools,—and this the local board seems to have determined,—it then became, not only the right, but the duty, of the board to require that the pupils of such schools be vaccinated, as a sanitary condition imposed upon their privilege of attending the schools during the period of the threatened epidemic of smallpox. This power, as previously asserted, under the circumstances, was lodged in the local board of health, irrespective of the rule of the state board. The rule or by-law of the latter merely emphasized what was already the duty of local boards, in their respective jurisdictions, in times of danger of a smallpox epidemic,—to enforce vaccination, if that was believed to be the best and most effective method or means known of arresting or preventing the spread of the disease. That this was the belief of the state board when it adopted its by-law, and also of the local board when it made its rule or order in question, is certainly evident. It is declared in the order of the latter that "vaccination is the only preventive of the disease of smallpox." The local board did not attempt, under its order, to compel appellant's son to be vaccinated. Under a reasonable interpretation of its order, the board simply gave him the option or choice to be either vaccinated, or remain out of school until the danger of smallpox had passed. The facts alleged in the answer show that there had been an exposure in the community to smallpox, and that there was danger of an epidemic of that disease within the city of Terre Haute. Evidently, then, under the circumstances, prompt action upon the part of the

health authorities, in taking steps to arrest or prevent the spread of the disease, was essential. The first step taken by the board, it appears, was to prevent the spread thereof throughout the community by the children who each day assembled at the public schools from all parts of the city. It is a well-recognized fact that our public schools in the past have been the means of spreading contagious diseases throughout an entire community. They have been the source from which diphtheria, scarlet fever, and other contagious diseases have carried distress and death into many families. Surely there can be no substantial argument advanced adverse to the reasonableness of a rule or order of health officials which is intended and calculated to protect, in a time of danger, all school children, and the families of which they form a part, from smallpox or other infectious diseases.

In several of our sister states laws have been enacted expressly requiring vaccination,—some requiring it, however, only as a prerequisite to the privilege of attending the public schools, while others enforce it against all persons. In the case of *Abeel* v. *Clark*, 84 Cal. 226, 24 Pac. 383, the supreme court of that state upheld the constitutional validity of a statute requiring that all children attending the public schools should be vaccinated. In sustaining the act, the court, in the course of its opinion, said: "The act referred to is designed to prevent the dissemination of what, notwithstanding all that medical science has done to reduce its severity, still remains a highly-contagious and much-dreaded disease. While vaccination may not be the best and safest preventive possible, experience and observation, the test of the value of such discoveries, dating from the year 1796, when Jenner disclosed it to the world, have proved it to be the best method known to medical science to lessen the liability to infection with the disease." In *Bissell* v. *Davison*, 65 Conn. 183, 29 L. R. A. 251, 32 Atl. 348, the validity of a law authorizing school trustees to make vaccination a condition upon the privilege of children attending the public schools was sustained. The court in that appeal said: "The question before us is not whether the legislature ought to have passed such a law; it is simply whether it had the power to pass it. In no proper sense can this statute be said to contravene the provisions of § 1 of the first article of our state Constitution, as claimed by the plaintiff. It may operate to exclude his son from school, but, if so, it will be because of his failure to comply with what the legislature regards, wisely or unwisely, as a reasonable requirement, enacted in good faith to promote the public welfare." In *Duffield* v. *Williamsport School Dist.* 162 Pa. 476, 25 L. R. A. 152, 29 Atl. 742, appellant's minor son had been excluded from the public schools of the city of Williamsport. The expulsion, it appears, was under the authority of an ordinance adopted by the city which provided that "no pupil shall attend the schools of this city except they be vaccinated, or furnish a certificate from a physician that such vaccination has been performed." The school board in that case was notified by the board of health of an epidemic of smallpox prevailing in near-by cities and towns. Upon considering the communication from the board of health, and from the general alarm arising from a case of smallpox in that city, the school board adopted a resolution providing that no pupil should attend the public schools unless he had been vaccinated. The power to exclude appellant's son, under the circumstances in that case, was upheld. The court, in passing upon the question there involved, said: "It should be borne in mind that there is no effort to compel vaccination. The school board do not claim that they can compel the plaintiff to vaccinate his son. They claim only the right to exclude from the schools those who do not comply with such regulations of the city and the board of directors as have been thought necessary to preserve the public health. It would not be doubted that the directors would have the right to close the schools temporarily during the prevalence of any serious disease of an infectious or contagious character. This would be a refusal of admission to all the children of the district. They might limit the exclusion to children from infected neighborhoods, or families in which one or more of the members were suffering from the disease. For the same reason, they may exclude such children as decline to comply with the requirements looking to prevention of the spread of contagion, provided these requirements are not positively unreasonable in their character." In *Re Rebenack*, 62 Mo. App. 8, the St. Louis board of public schools ordered that all unvaccinated children should be excluded from the public schools of that city. In that case the charter law, under which the board of public schools was created, provided that the president and directors thereof should have the power "to make all rules, ordinances, and statutes proper for the government and management of such schools," etc., "so that the same shall not be inconsistent with the laws of the land." The court in that case held that the school board has the right to require the vaccination of children in attendance at school, and to exclude those therefrom who refused to comply with the order. In *Morris* v. *Columbus*, 102 Ga. 792, 42 L. R. A. 175, 30 S. E. 850, the supreme court of that state held that the legislature, in the exercise of the police power, may confer upon municipal corporations the authority to make and enforce ordinances requiring all persons who may be within the limits of such corporations to submit to vaccination whenever an epidemic of smallpox is existing or may be reasonably apprehended. See also *Re Walters*, 65 N. Y. S. R. 479, 32 N. Y. Supp. 322. In Parker & W. Public Health & Safety, § 123, the rule is stated as follows: "It is sometimes provided by law that persons who may have been exposed to contagion, or who came from places believed to be infected, and particularly children at-

tending the public schools, shall submit to vaccination, under the direction of the health authorities. This requirement is a constitutional exercise of the police power of the state, which can be sustained as a precautionary measure in the interest of the public health."

In the case of *Potts* v. *Breen*, 167 Ill. 67, 39 L. R. A. 152, 47 N. E. 81, it is held, in the absence of an express authority from the legislature, that a rule of the state board of health requiring the vaccination of children as a prerequisite to their attending the public schools is unreasonable when smallpox does not exist in the community, and there is no reasonable ground to apprehend its appearance. The same doctrine is reaffirmed in the case of *Lawbaugh* v. *Dist. No. 2, Bd. of Edu.* 177 Ill. 572, 52 N. E. 850. In the appeal of *State ex rel. Adams* v. *Burdge*, 95 Wis. 390, 37 L. R. A. 157, 70 N. W. 347, it is also affirmed that in the absence of a statute authorizing compulsory vaccination, or making it a condition to the privilege of attending the public schools, a rule of the state board of health which excludes from the public and other schools all children who do not present a certificate of vaccination is unreasonable, if at the time of its adoption there was no smallpox epidemic in the city, and no sufficient cause for the school authorities to believe that the disease would become prevalent in the city where the rule was sought to be enforced. The court in that case, speaking in respect to the powers of health boards, said: "It cannot be doubted but that, under appropriate general provisions of law in relation to the prevention and suppression of dangerous and contagious diseases, authority may be conferred by the legislature upon the state board of health or local boards to make reasonable rules and regulations for carrying into effect such general provisions, which shall be valid, and may be enforced accordingly. The making of such rules and regulations is an administrative function, and not a legislative power, but there must first be some substantive provision of law to be administered and carried into effect. The true test and distinction whether a power is strictly legislative, or whether it is administrative, and merely relates to the execution of the statute law, 'is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring authority or discretion as to its execution, to be exercised under and in pursuance of the law.' The first cannot be done. To the latter no valid objection can be made." Neither the holding of the supreme court of Illinois nor Wisconsin in the cases mentioned can, under the facts, be said to militate against the conclusion which we reach in the case at bar. In fact, there is much asserted in both cases which may be said to be in harmony with our holding herein. We are not called upon, however, to decide whether a rule of either the state board or local board of health can be carried beyond the limits of the facts in this case. Appellant contends that, under the order of the local board, his son was to be permanently expelled from the public schools of the city of Terre Haute unless he submitted to vaccination. No such unreasonable interpretation can be placed upon the rule or order in question. The order was the offspring, as we have seen, of an emergency arising from a reasonable apprehension upon the board's part that smallpox would become epidemic or prevalent in the city of Terre Haute. The rule or order could not be considered as having any force or effect beyond the existence of that emergency; and Kleo Blue, by virtue of its operation, could only be excluded from school upon his refusal to be vaccinated, until after the danger of an epidemic of smallpox had disappeared. Any other construction than this would render the rule or order absurd, and place the board in the attitude of attempting to usurp authority. Such an interpretation is not authorized when a more reasonable one can be applied.

It is true, as insisted, that the privilege of children in this state to attend the public schools is guaranteed by the Constitution, at least to the extent that tuition shall be free, and such schools shall be equally open to all. Article 8, § 1, of the Constitution; *Cory* v. *Carter*, 48 Ind. 327, 17 Am. Rep. 733. It is equally true, however, that they are frequently denied this privilege, by reason of their refusal to submit to the proper rules of school discipline. There is no express law in this state authorizing the expulsion from school of boisterous or disobedient pupils. That a rule to this effect upon the part of school officials or teachers may be enforced, no one will controvert. If expulsion can result from the violation of a rule, the object of which is to promote the morals of the scholars and the efficiency of the school in general, certainly one which is intended and calculated to promote the health of the scholars ought to be sustained.

There is nothing disclosing that appellant's son was in a condition of health which would exempt him from the requirements of this order, but, upon the contrary, it was shown that he was "well and healthy." It is said in appellant's brief that there was no investigation upon the part of the health authorities to ascertain whether his son had been exposed to smallpox. It appears, however, that there had been an exposure upon the part of the community; and it would be an absurdity, under such circumstances, to require the health officials, before taking action to prevent the spread of the disease, to investigate in order to determine the degree of exposure to which every person in the community had been subjected. The question as to what is an exposure to smallpox, so as to be affected thereby, is certainly one which, in the main, must be left to the sound discretion or judgment of the health officers. The supreme court of Massachusetts, in *Salem* v. *Eastern R. Co.* 98 Mass. 443, 96 Am. Dec. 650, in speaking in regard to the right of boards of health to make general orders, and enforce them

without unnecessary delay, said: "Their action is intended to be prompt and summary. They are clothed with extraordinary powers for the protection of the community from noxious influences affecting life and health, and it is important that their proceedings should be embarrassed and delayed as little as possible by the necessary observance of formalities." The exclusion of appellant's son was not, as insisted, in the nature of a penalty. Neither can the rule or order in question be considered as compelling his vaccination. It, as previously said, was only a prerequisite to his attendance at school during the period of danger.

Owing to the public importance of the questions involved in this case, we have given them much consideration, and perhaps have unnecessarily extended this opinion; but under the facts, when tested by the firmly-settled legal principles, we are constrained to uphold the order of the local board of health of the city of Terre Haute, as a valid exercise of power upon its part, and we therefore conclude that appellees were justified in excluding appellant's son from the public schools during the continuance of the emergency or danger from smallpox. It follows, therefore, that the court did not err in overruling the demurrer to each paragraph of the answer, nor in sustaining appellees' demurrer to the second, fourth, and sixth paragraphs of the reply.

The judgment is affirmed.

Petition for rehearing denied June 20, 1900.

STATE of Indiana *ex rel.* John W. BRUNS, *Appt.*,
v.
Edward F. CLAUSMEIER *et al.*

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

1. **A sheriff may lawfully take the photograph** and measurements, weight, name, residence, place of birth, occupation, and personal characteristics of an accused person committed to his custody for safe keeping, if in his discretion it is necessary to prevent his escape, or to facilitate his recapture in case he should do so.

2. **The official bond of a sheriff is not liable** for his act in sending out a photograph and description of a person committed to his charge, together with a statement of the accusation against him, in such a manner as to be libelous.

(May 29, 1900.)

APPEAL by relator from a judgment of the Circuit Court for Allen County in favor of defendants in an action brought to recover damages for the alleged wrongful acts of defendant Clausmeier as sheriff while relator was in his custody under indictment for forgery. *Affirmed.*

The facts are stated in the opinion.

Messrs. **Ninde & Sons** and **C. Holden** for appellant.

Messrs. **Morris, Barrett, & Morris,** for appellees:

If Kaough, Mohr, and McCulloch forced the relator from his cell to the jail office for an illegal and wrongful purpose, and there maltreated him, they may be liable for any damages thereby done to him, in an action for trespass for an assault, or assault and battery, but not for a breach of the bond sued on.

Neither Kaough, Mohr, nor McCulloch owed the relator any duty. As the bond is joint, and not several, nor joint and several, it follows that they can only be held liable by a suit against them for such wrong. The wrong thus done could not be regarded as a breach of the bond.

State ex rel. Harrison v. *Galbraith*, 128 Ind. 501, 28 N. E. 127; *Ex parte Reed*, 4 Hill, 573; *People ex rel. Kellogg* v. *Schuyler*, 5 Barb. 166; *State, Allen, Prosecutor*, v. *Conover*, 28 N. J. L. 224, 78 Am. Dec. 54; *State use of Butts* v. *Brown*, 33 N. C. (11 Ired. L.) 141; *Gerber* v. *Ackley*, 32 Wis. 233.

The photograph of a person is as just to him as his creator. The picture can do no harm or wrong to the original.

It is the sheriff's duty to use such reasonable precaution as the case may require to prevent an escape,—especially in arrests for felony, or offenses of magnitude.

It was for the sheriff to determine what precaution was, in his judgment, reasonable.

The prisoner, knowing that the public, in case he should escape, would be instantly placed in possession of his photograph, would hardly attempt to escape.

Firestone v. *Rice*, 71 Mich. 377, 38 N. W. 885; *Diers* v. *Mallon*, 46 Neb. 121, 64 N. W. 722.

If the sheriff had no right to take Bruns's photograph, but was simply a joint trespasser with his sureties, no suit will lie on the bond sued on for such wrong.

If the sureties are not liable on the bond, neither is the sheriff liable. Neither is liable on the bond unless there is a breach of it.

State ex rel. Martin v. *Long*, 30 N. C. (8 Ired. L.) 415; *State ex rel. Logansport Nat. Bank* v. *Kent*, 53 Ind. 112; *State ex rel. Arnold* v. *Givan*, 45 Ind. 267.

The liability of the sheriff and his sureties on this bond is joint and the same. They are liable upon it as one, not as several. It is contractual and must be strictly construed. It cannot be enlarged by construction.

State ex rel Logansport Nat. Bank v. *Kent*, 53 Ind. 118; *People use of Logan County* v. *Toomey*, 122 Ill. 308, 13 N. E. 521.

The sureties on a sheriff's bond are not liable for false imprisonment not done *virtute officii.*

Huffman v. *Koppelkom*, 8 Neb. 344; *Otten-*

NOTE.—As to liability on official bonds for trespasses or unauthorized acts done *colore officii*, see McLendon v. State use of Kennedy (Tenn.) 21 L. R. A. 738; State use of Cocking v. Wade (Md.) 40 L. R. A. 628.

As to taking money or property from a prisoner, see Holker v. Hennessey (Mo.) 39 L. R. A. 165.

stein v. *Alpaugh*, 9 Neb. 240, 2 N. W. 219; *Scott* v. *State ex rel. Roberts*, 46 Ind. 203; *Schoss* v. *White*, 16 Cal. 65; *Bromley* v. *Hutchins*, 8 Vt. 194, 30 Am. Dec. 465; *Gerber* v. *Ackley*, 37 Wis. 44, 19 Am. Rep. 751; *People use of Macon County* v. *Foster*, 133 Ill. 496, 23 N. E. 615.

Assuming that the sending of Bruns's photograph and the accompanying description of his person to the rogue's gallery would be wrong, the sheriff and those who assisted *him in making* such a disposition of the picture of Bruns might be liable individually to him for such wrong, but not officially, for the reason that there is no law making such a distribution a part of the sheriff's duty. Therefore, neither he nor his sureties are liable upon the bond sued on.

Com. use of Richardson v. *Cole*, 7 B. Mon. 250, 46 Am. Dec. 506; *Gerber* v. *Ackley*, 37 Wis. 44, 19 Am. Rep. 751; *Carey* v. *State ex rel. Farley*, 34 Ind. 105; *State ex rel. Arnold* v. *Givan*, 45 Ind. 267; *State ex rel. Logansport Nat. Bank* v. *Kent*, 53 Ind. 116; *Ex parte Reed*, 4 Hill, 572.

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

This action was brought by the relator against appellee Clausmeier, on his official bond as sheriff, and the other appellees, sureties on said bond, to recover damages for an alleged breach thereof. A demurrer for want of facts was sustained to the complaint, and, the relator refusing to plead further, judgment was rendered in favor of appellees.

It is alleged in the complaint that while the relator was confined in the jail of Allen county, and in the custody of said Clausmeier, as sheriff, on a charge of forgery, said Clausmeier, *on the 13th day of November, 1896*, "without the consent and against the wish of said relator, compelled him, by force of commands, and threatening physical compulsion, to come forth out of his cell in said jail, into the office of said jail, and then and there, *intentionally*, wrongfully, unlawfully, and maliciously, took the picture of said relator, and on the same day, without the consent and against the wish and notwithstanding the protest of relator, said Clausmeier weighed and measured said relator, and by observation of the body of said relator, and by inquiry of him, and by means of records obtained a personal description of relator;" that on said 15th day of November, 1896, and thereafter, said Clausmeier, "maliciously intending to ruin the relator's fair name and reputation, and to bring said relator into public infamy, disgrace, and scandal, by holding said relator up to scorn, ridicule, contempt, and execration, and to impair his enjoyment of general society by imputing and *implying that said relator had committed* a crime and was a rogue and a criminal, by associating the picture of the relator with the pictures of criminals, and representing the said relator as a criminal and as a person whom the police should watch, and whom the officers of the law generally should observe and watch more critically than said officers and said police do mankind generally who are not known as criminals, by placing the picture of said relator on cards which are used for mounting the pictures of criminals, and using said pictures for the express and sole purpose of holding said relator forth as a criminal, on said day did maliciously and falsely make and publish of and concerning the relator the following false, scandalous, malicious, and defamatory words, and picture of said relator in connection therewith [the description of the relator, and the charge against him, and by whom he was arrested, as shown on the back of said picture, are set forth in the complaint]; that the pictures of persons, taken and mounted as aforesaid on cards of that style, *with the* words and combination of words printed and written thereon, as a whole, when exhibited and used as these were, have a definite and well-known meaning, that said persons are criminals and rogues, and that said pictures and words *make what are well and popularly* known as the 'Rogues' Gallery'; that said Clausmeier, before the relator had any opportunity to prove his innocence of the charge for which he was committed, wrongfully, unlawfully, and maliciously caused large numbers of *the picture of said relator*, and said words and combination of words on the reverse side thereof, to be sent and placed in the police department of the city of Ft. Wayne, and to divers persons to the relator unknown, and has widely published the libel *here complained of*; that said relator was innocent of said charge, and was afterwards honorably acquitted of the said charge placed against him. Whereby and by means of which acts aforesaid said relator has been greatly prejudiced in his credit and reputation, and brought into public scandal, infamy, and disgrace, and has suffered in his good name, fame, and reputation, and has suffered damage thereby," etc.

It is the duty of a sheriff to confine in jail and safely keep all persons in his custody, awaiting trial on a charge of crime, until lawfully discharged, and, if they escape, to pursue and recapture them. A sheriff, in making an arrest for a felony on a warrant, has the right to exercise a discretion, not only as to the means *taken to apprehend* the person named in the warrant, but also as to the means necessary to keep him safe and secure after such apprehension until lawfully discharged; and he has the right to take such steps and adopt such measures *as, in his discretion*, may appear to be necessary to the identification and recapture of persons in his custody if they escape. Unless this discretion is abused through malice, wantonness, or a reckless disregard for, and a selfish indifference to, the common dictates of humanity, the officer is not liable. *Firestone* v. *Rice*, 71 Mich. 377, 38 N. W. 885; *Diers* v. *Mallon*, 46 Neb. 121, 64 N. W. 722. It is the duty of the said officer to search the person, and take from him all money or other articles that may be used as *evidence* against him at the trial. *Rusher* v. *State*, 47 Am. St. Rep. 175, and note on page 180, 50 L. R. A.

94 Ga. 363, 21 S. E. 593. And he may take from him any dangerous weapons, or anything else that said officer may, in his discretion, deem necessary to his own or the public safety, or for the safe keeping of the prisoner, and to prevent his escape; and such property, whether goods or money, he holds subject to the order of the court. *Closson* v. *Morrison*, 47 N. H. 482, 93 Am. Dec. 459; *Commercial Exch. Bank* v. *McLeod*, 65 Iowa, 665, 54 Am. Rep. 36, 19 N. W. 329, 22 N. W. 919; *Reifsnyder* v. *Lee*, 44 Iowa, 101, 24 Am. Rep. 733; *Holker* v. *Hennessey*, 64 Am. St. Rep. 524, 532, and note p. 537, 141 Mo. 527, 540, 39 L. R. A. 165, 42 S. W. 1090; Gillett, Crim. L. 2d ed. § 158. In *Closson* v. *Morrison*, 47 N. H. 482, 93 Am. Dec. 459, and *Holker* v. *Hennessey*, 64 Am. St. Rep. 524, 532, and note p. 537, 141 Mo. 527, 540, 39 L. R. A. 165, 42 S. W. 1090, it was held that said officer might not only take any deadly weapon he might find on the person, but also money or other articles of value found upon the person, though not connected with the crime for which he was arrested, and could not be used as evidence on the trial thereof, by means of which, if left in his possession, he might procure his escape, or obtain tools, implements, or weapons with which to effect his escape. It would seem, therefore, if, in the discretion of the sheriff, he should deem it necessary to the safe-keeping of a prisoner and to prevent his escape, or to enable him the more readily to retake the prisoner if he should escape, to take his photograph, and a measurement of his height, and ascertain his weight, name, residence, place of birth, occupation, and the color of his eyes, hair, and beard, as was done in this case, he could lawfully do so. The complaint does not charge that any physical force was used to induce the relator to have his negative taken, or to furnish the sheriff the information above mentioned not obtainable by observation. It is evident that the substantial cause of action set forth in the complaint is an alleged libel of the relator by the appellee Clausmeier, in the publication of said pictures and the writing on the backs thereof, by sending the same to the police department of Ft. Wayne, and to divers persons to the relator unknown. Conceding, without deciding, that if a sheriff commit an assault and battery upon a person in his custody, *or fails to use ordinary care to protect* him against acts of violence from others, he and his sureties are liable on his official bond to such person therefor, yet it does not follow that a sheriff and his sureties are liable on his official bond for libelous words published by said sheriff of and concerning a person in his custody. If a sheriff have a person in his custody on a charge of crime, and orally or in writing uses language concerning said person which is slanderous or libelous *per se*, while he may be liable to an action therefor, there is no liability on his official bond on account thereof. A person who is a sheriff, in speaking or writing such language under such circumstances, is not guilty of any misfeasance or nonfeasance as such officer. He is neither performing an official duty in a proper or improper manner, nor doing any act whatever as an officer. It is evident that said Clausmeier, in sending said photographs with the writing on the backs thereof, was not acting either *virtute officii* or *colore officii*. Under such circumstances there is no liability on an official bond. *State ex rel. Arnold* v. *Givan*, 45 Ind. 267; *State ex rel. Logansport Nat. Bank* v. *Kent*, 53 Ind. 112. It is unnecessary, therefore, to determine whether or not the photographs and the words thereon were libelous, when considered in connection with the other allegations of the complaint.

Judgment affirmed.

PENNSYLVANIA SUPREME COURT.

LAND TITLE & TRUST COMPANY
v.
NORTHWESTERN NATIONAL BANK, *Appt.*

(196 Pa. 230.)

Payment to a collecting bank of a check bearing a forged indorsement of the payee's name does not entitle the drawee bank to recover back the proceeds on the theory that the collecting bank had guaranteed the indorsement, when the drawee had drawn the check on itself, and delivered *it to a person who falsely personated* the payee named therein, for money to be loaned on a mortgage.

(*Dean, J., and Green, Ch. J., dissent.*)

(May 21, 1900.)

NOTE.—*Check or bill issued, or indorsed, to impostor—who must bear loss.*

This note is not intended to cover cases in which the check or bill was lost or stolen after delivery to the true payee, and then cashed or negotiated upon a forged indorsement; nor, except incidentally to point distinctions, any cases in which the check or bill was stolen before delivery.

Theory of actual intent.

The view, *adopted by the prevailing opinion* in the principal case, that the bank, in paying the check upon the indorsement of the impostor under the assumed name, carried out the intention with which the drawer *issued* the check, although that intention was induced by a mistake of fact as to the impostor's identity, has been quite generally taken by the courts in cases presenting a similar state of facts, notwithstanding that, in order to attribute such an intention to the drawer, it is necessary to eliminate, as a part of it, his belief that the payee is the person who really bears the name used in the check, and who really owns the consideration for which the check is exchanged.

There has been a singular uniformity in the scope and general details of the methods *employed in perpetrating frauds of the character* of that involved in the principal case; but it is apparent that a very slight variation will suffice to render the theory of actual intent

APPEAL by defendant from a judgment of the Court of Common Pleas, No. 2, for Philadelphia County, in favor of plaintiff in an action to recover the amount of a check which plaintiff paid to defendant when it bore a forged indorsement. *Reversed.*

The facts are stated in the opinion.

Messrs. **Richard C. Dale** and **Alfred Moore** for appellant.

Mr. **John G. Johnson,** for appellee:

In the use of a draft payable at a bank to the order of a particular person, the bank is entitled to charge its depositor, the acceptor of such draft, with the amount thereof only in case it paid upon a genuine indorsement.

Robarts v. *Tucker,* 16 Q. B. 560.

Bank of England v. *Vagliano Bros.* [1891] A. C. 107, did nothing more than decide that because of the directions of the English statute the draft to the order of Petridi was really payable to bearer. Proper credit followed from a payment by the bank of a genuine acceptance by its customer payable to bearer, ordered by him to be paid.

Money paid by a bank upon a forged indorsement of a check to order can be recovered by it if it proceeds promptly upon discovery of the fact of the forgery.

McConeghy v. *Kirk,* 68 Pa. 200; *Chambers* v. *Union Nat. Bank,* 78 Pa. 205; *Iron City Nat. Bank* v. *Fort Pitt Nat. Bank,* 159 Pa. 46, 23 L. R. A. 615, 28 Atl. 195; *Turnbull* v. *Bowyer,* 40 N. Y. 456, 100 Am. Dec. 523; *State Bank* v. *Fearing,* 16 Pick. 533, 28 Am. Dec. 265; *Howe* v. *Merrill,* 5 Cush. 80; Byles, Bills, 7th ed. p. 224; *Ogden* v. *Benas,* L. R. 9 C. P. 513.

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inapplicable. Thus, it does not apply if the impostor, instead of assuming the name by which the payee is described in the check, assumes merely to be the agent of a person of that name. Nor does it apply where the drawer is not completely deceived as to the identity of the person to whom he delivers the check, but delivers it to him in the faith that, if he is not the person he represents himself to be, the bank will *refuse payment of the check to* him, or upon his indorsement.

In the following cases, which, it will be observed, are in their essential features very much like the principal case, the courts determined the rights of the respective parties upon the theory of actual intent.

In United States v. National Exch. Bank, 45 Fed. Rep. 163, an impostor had procured possession of postoffice orders payable to another person. By fraudulent representations he induced a person to believe that he was the man to whom the orders were made payable, and that person identified him as such to the officials of the postoffice. The latter gave the impostor a check in which the payee was described by the name borne by the payee of the orders. The same person identified the impostor at the bank, and the bank cashed the check for him. The United States brought an action *against the bank to recover the amount* of the check, which had been charged up to it. The court held that the plaintiff could not recover. The opinion says: "The question for the bank is, 'For whom was this money intended by the drawer?'—and the name is but one means of determining that question. . . . Without doubt the postmaster would have paid currency instead of a check, if he had had it in hand, rather than in bank. If he would not, it would be very good evidence of neglect to deliver a check to a party, and put it in his power to draw the money on a forged indorsement in circumstances where the postmaster would not have been satisfied to part with the cash. Allowing the drawer and drawee to be equally innocent, the loss should fall upon that one who, by his act, has been the occasion of the loss which in this case, I think, was the department. Though there *may have been no* express negligence on the part of the officials of the postoffice, it was a mistake to deliver the check to a person not entitled to it, and that mistake has been the occasion of the loss."

In Levy v. Bank of America, 24 La. Ann. 220, 13 Am. Rep. 124, the plaintiffs, brokers, purchased from a stranger a state warrant drawn to the order of, and indorsed by, the secretary of the state senate. Upon the stranger's representation that he was the secretary and the payee they delivered him a check purporting on its face to be payable to the order of such secretary. It appeared that the amount stated in the warrant had been raised, and the plaintiffs were finally compelled to repay the amount by which it was raised; and it also appeared that the person to whom the check was delivered was not the secretary, and that he *indorsed the check in the latter's name* without authority. The plaintiffs sued the bank for having paid the check on such indorsement. The case was decided against plaintiffs on the authority of the earlier case of Smith v. Mechanics' & T. Bank, 6 La. Ann. 610, *infra.* The plaintiffs attempted to distinguish it from that case on the ground that in the present case it appeared it was the plaintiffs' custom to make checks payable to the payees of the warrants purchased; but the court said that the plaintiffs could not successfully complain that the bank had failed to protect them against their own mistake.

In E. S. Karoly Electrical Constr. Co. v. Globe Sav. Bank, 64 Ill. App. 225, rehearing denied in 64 Ill. App. 230, an officer of a corporation introduced to a banker a stranger who had assumed the name of a real person who had no connection with the transaction. The bank discounted a note made by the corporation, and at the request of the officer drew a check payable to the order of the stranger under the assumed name. The check, purporting to bear the indorsement of the payee, was deposited by, and credited to, the account of the corporation in another bank. The latter bank collected it from the drawee bank, but subsequently, upon the claim that the indorsement was forged, reimbursed the drawee and sued its own depositor (the corporation). The amount of the check had been refunded to the drawer by the drawee bank, but it does not appear whether *the note had been returned* to its maker by the drawer of the check. The opinion takes the position that it does not appear but that the person to whom the check was delivered indorsed it, and if he did there was no forgery, since it was intended that he should indorse it, and it made no difference whether the check was made payable to and indorsed by him in his real name or in an assumed name. Eliminating the non-essential features, the original rights of the drawer and drawee furnish the criterion for the determination of the rights of the parties.

It will be observed in this case, however, that the use of an assumed name did not harm the drawer of the check, since the consideration for the check was the note of the corpo-

The check upon the appellee was not indorsed by the party in whose favor it was drawn.

The action of the appellant was not induced by anything known to it, done by the appellee.

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

The fraudulent transaction which gave rise to this litigation may be briefly stated: Dr. Herman S. Bissey was the owner of premises No. 2352 North Broad street, Philadelphia, which he wished to sell. A man who gave his name as Ashley called on Dr. Bissey, and, under the pretense of desiring to purchase the property, got possession of the title papers, and took them to a responsible conveyancer, to whom he applied for a loan of $5,000, to be secured by a mortgage of the property. The conveyancer, believing the man to be Dr. Bissey and the owner of the premises, negotiated the loan. The mortgagee, desiring title insurance by the Land Title & Trust Company, deposited with it the amount of the loan, to be paid to the mortgagor when a valid mortgage should be executed. When the matter was ready for settlement, Ashley went with his conveyancer to the office of the company, and was there introduced to the settlement clerk as Dr. Bissey. He signed the mortgage, "Herman S. Bissey," acknowledged it before a notary connected with the company, and received from the clerk the company's check, drawn on itself to the order of Herman S. Bissey. This check, indorsed, "Herman S. Bissey," was deposited in the Northwestern National Bank by a person who had opened an account with it as G. B. Rogers, and was

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ration, which was delivered to it by an officer, who, for aught that appears, had full authority to do so.

In Emporia Nat. Bank v. Shotwell, 35 Kan. 360, 57 Am. Rep. 171, 11 Pac. 141, an impostor, by assuming the name of the owner of property, procured a loan. The proceeds were sent by mail in the form of a draft, in which the payee was described by the name of the owner of the property. The lender (the purchaser of the draft) took an assignment of the draft, and the right to receive payment thereof, from the owner of the property, and from the bank from which he had purchased the draft, and brought an action against the bank on which the draft was drawn, and which paid it on the indorsement of the impostor. The court held that the lender, rather than the drawee bank, must bear the loss, because he intended the draft to be sent to the party who executed the notes and mortgages, and intended it to be paid to the person to whom he sent it, and whom he designated by the name of the owner of the property, because that was the name which he assumed in executing the notes and mortgages, and, therefore, the bank was protected in paying the draft to the very person whom the lender intended to designate by that name. It was claimed that the bank did not use sufficient care and diligence in having the payee of the draft identified, but the court held that that was not important in view of the intention of the lender.

In Crippen v. American Nat. Bank, 51 Mo. App. 508, an impostor, assuming the name of the owner of certain property, procured a loan upon it. The proceeds of the loan were remitted by a draft payable to the order of the lender's agent. The agent indorsed the same to the person who had procured the loan, and the latter indorsed it, in the assumed name, to a bank, which collected it from the drawee. The action was by the lender against the bank on which the draft was drawn. The court held that the loss must fall on the plaintiff, rather than on defendant. The court took the position that "the indorsement was the genuine indorsement of the person to whom the loan had been made and for whom the draft was intended," holding that the case was distinguishable from one where a draft by accident falls into the hands of a person not entitled thereto, for which the injured party is not responsible. The court said that in such a case the injured party, being in no fault, might be entitled to relief against the purchaser of the stolen draft, but that in the case at bar the draft was not stolen, but was indorsed and sent to the very person who received and negotiated it; and the loss occasioned by the fraud of the impostor must logically and justly be cast upon the plaintiff, but for whose negligence it would not have been likely to happen.

In Meridian Nat. Bank v. First Nat. Bank, 7 Ind. App. 322, 33 N. E. 247, 34 N. E. 608, a check in payment of cattle was delivered to a person who had stolen them. He had given a fictitious name, and the payee was described by that name. The action was by a bona fide purchaser of the check upon an indorsement made by the impostor against the drawee. The case was decided for the plaintiff upon the theory that the indorsement of the check by the person to whom it was actually delivered, and by whom the drawer intended that the money should be received, was an effectual indorsement. The court said: "It is the identity of the person, and not of the name, which controls." In this case, however, as remarked in the opinion, even the drawer did not have in his mind, as the payee, any other or different person whom he erroneously believed the person to whom he delivered the check to be.

In Robertson v. Coleman, 141 Mass. 231, 55 Am. Rep. 471, 4 N. E. 619, a stranger, falsely assuming the name of a real person, took stolen goods to the defendant, who sold them for him and gave him a check in which the payee was described by the assumed name, the defendant believing that to be his name. The impostor indorsed the check in that name, and it came to the hands of plaintiff, a bona fide holder, who sued the drawer after the latter had stopped payment. The court, in deciding for plaintiff, said: "The name of a person is the verbal designation by which he is known, but the visible presence of a person affords surer means of identifying him than his name;" again: "It is clear from these facts that, although the defendants may have been mistaken in the sort of man the person they dealt with was, this person was the person intended by them as the payee of the check, designated by the name he was called in the transaction, and that his indorsement of it was the indorsement of the payee of the check by that name. The contract of the defendants was to pay the amount of the check to this person or his order, and he has ordered it paid to the plaintiff. If this person obtained the check from the defendants by fraudulent representations the plaintiff took it in good faith and for value."

In American Exch. Bank v. City Bank, 5 N. Y. Legal Obs. 18 (an action by the indorsee of the check against the drawee bank),

collected by the bank of the trust company in the usual course of business. Whether Ashley and Rogers were the same person, or different persons who had conspired to defraud the trust company, and had opened an account with the bank as a means to that end, or whether Rogers was a person who was innocent in the matter, did not appear at the trial. Dr. Bissey had no knowledge of the mortgage until called on six months later for the interest. All of the parties to the transaction, except Ashley, and possibly Rogers, if he were a different person, acted in good faith, and in that reliance on the good faith of others which is usual in such matters. Ashley by some means induced a well-known and reputable conveyancer to believe that he was Dr. Bissey. The business followed the usual routine by which hundreds of such transactions are carried on every day, and nothing occurred during its course to put the other parties on their guard. On discovering the fraud which had been practised upon it, the trust company notified the bank, and demanded the return of the money paid on the check, and, on the refusal of the bank, brought this suit. At the trial a verdict was directed for the plaintiff.

The case, as presented by the plaintiff's declaration, is that of the payment by the plaintiff of a check drawn on it by a depositor to the order of a third person, whose indorsement was forged; the payment having been made in reliance upon the subsequent indorsement of the defendant; the ground of liability being that the defendant, by its indorsement and presentation, warranted the genuineness of the indorsement of the payee, Herman S. Bissey. While by this

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the court said that the holder was not guilty of negligence in failing to inquire as to the indorsement, and that, since the indorsement was made by the person to whom the check was given, and to whom it was intended to be given, the bank should pay it, although the name was fictitious.

In addition to the foregoing cases in which the doctrine was expressly applied, it was recognized in First Nat. Bank v. Farmers' & M. Bank, 56 Neb. 149, 76 N. W. 430, *infra*, although its application was denied. In that case the local correspondent of a trust company forwarded to it an application for a loan purporting to be made by the owner of certain property. The trust company accepted the application, and sent to its correspondent a check in which the payee was described by the name of the owner of the property. The check was presented to the bank, indorsed in the name of the payee, and also in the name of the correspondent. It proved that the owner did not sign, or authorize anyone to sign, the application for him. The drawee bank, after learning of the supposed forgery, credited the amount of the check back to the drawer, and brought suit against banks which had indorsed it before it was paid. It is apparent that, if the impostor's indorsement could be deemed a genuine indorsement, the plaintiff must fail in the action. The decision was in favor of the plaintiff (the drawee), but was placed upon the ground that it showed that the forgery of the application was by the correspondent of the drawer, and that the check also was forged by him, and that there was no third party concerned in the transaction. The court, however, said, in sustaining a charge of the trial court, that if someone other than the correspondent, or even someone in collusion with him, had falsely pretended to own the land, executed the bond and mortgage, and indorsed the check, the indorsement would not be forged; it would be by the person to whom the check was in terms payable; the false representation of ownership of the land, and the assumption of a false name, would be merely steps in defrauding the trust company, but the crime would not be forgery; if the correspondent himself executed the previous papers and indorsed the check, the indorsement was a forgery because he was not the one intended as the payee, nor was he described as such. This case illustrates the fact already alluded to, that a very slight change of circumstances renders the doctrine inapplicable.

The doctrine seems also to be recognized by Dodge v. National Exch. Bank, 30 Ohio St. 1, In that case an impostor had obtained possession of a certificate of indebtedness due from the United States, and presented it to a paymaster, who delivered him a check in which the payee was described by the name of the person to whose order the certificate was payable. The action was by the true owner of the certificate against the bank on which the check was drawn, and which paid the same. The court said that "the defendant had a right to show, if it could, that the person to whom the check was delivered was, in fact, the person whom the drawer intended to designate by the name" used in the check; and held that, for that purpose, it might show the circumstances under which the check was drawn, the representations of the party to whom the check was delivered, and the action of the drawer thereupon, with his accompanying declarations; but also held that the trial court erred in excluding the portion of a statement of facts tending to show that the check was delivered to the impostor only on his promise and assurance that he could, and would, identify himself at the bank as the person whose name was given in the check. The opinion in this case seems to put the court in the extraordinary position of holding that if the drawer is completely deceived the bank will be protected, upon the theory that in paying the check it has merely carried out his intention, while, if he is not completely deceived, but intends to devolve the duty upon the bank of seeing that the check is paid to the proper person, the bank must bear the loss, at least unless the loss can be thrown upon the drawer, because of his negligence. Upon a previous appeal in that case, however, a majority of the court held that, as it was competent for the drawer to make his check payable to the order of the owner of the certificate, and devolve the duty upon the bank of paying only on his genuine order, the liability of the bank could not be affected or discharged by any act or omission of the drawer in issuing the check, of which the banks had no notice and which in no way influenced its conduct: citing Robarts v. Tucker, 16 Q. B. 560, 3 English Ruling Cases, 680, *infra*.

Smith v. Mechanics' & T. Bank, 6 La. Ann. 610, carries the theory of actual intent further than any of the foregoing cases. In that case a broker discounted for a stranger, without inquiry, a bill purporting to be accepted by a firm well known to him. He delivered a check to the stranger, but evidently for the purpose of making it necessary for him to obtain their indorsement, before cashing the

statement of the case the trust company is considered as a banker only, whereas in fact it was both the banker and the drawer of the check, it fairly presents the fundamental question involved. A recovery must be had on the ground alleged, or not at all.

Generally a bank is not bound to know the signature of the indorser of a check, and, if it pays a check on a forged indorsement, it can recover the money of the party to whom it was paid, if it proceeds promptly on discovery of the fraud. This is upon the principle that the indorsement of a check is an implied warranty of the genuineness of the previous indorsements. But, in order that a bank may recover, it must appear that it has sustained a loss. If it can charge the payment to the account of the depositor, it has lost nothing, and has no cause of action. The question is, then, the same, whether we consider the check as having been drawn by an ordinary depositor in the trust company, or as having been drawn, as it was, by the real-estate department of the company, on the banking department. While, as between the bank and the trust company, as a banker, the former is bound by its implied warranty of the indorsement, still there is no cause of action unless the payment of the check was not, as against the drawer of the check, a good payment. The reason of the rule that when a bank pays a depositor's check on a forged indorsement, or a raised check, it is held to have paid it out of its own funds, and cannot charge the payment to the depositor's account, is that there is an implied agreement by the bank with its depositor that it will not disburse the money standing to his credit, except on his order. The rule applies

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check, made it payable to the order of the firm which had accepted the bill. It proved that the acceptance was forged, and the firm's indorsement was also forged, and the check cashed by the bank on which it was drawn. The action was by the broker against the banker for the balance of his account without deducting the check. The decision of the court is against the plaintiff (the drawer), notwithstanding that the prevailing opinion says that "the payment of the check must be conceded to have been gross negligence on the part of the clerk of the bank." (It appeared that the forgery was a very bad one, the name of one of the members of the firm being badly misspelled.) This decision in the original opinion appears to rest upon the ground that, notwithstanding the gross neglect of the bank, the first fault was committed by the plaintiff in taking a forged bill, and therefore he ought to bear the loss; but the opinion delivered on a motion for rehearing puts it upon the ground that the person to whom the check was delivered was the real payee, and that the firm was only the nominal payee. That opinion says that if the firm had been the real payee the bank might have been liable. Again: "Taking the facts as they were before us, and limiting the decision to the case in hand, we held [on the former argument] that, as it was no part of the contract between plaintiff and the bank that he should have the right to draw checks in that form, the bank might go behind the check and justify the payment by showing that it had been made to the creditor whom the plaintiff intended to pay. . . . The fact that the signature . . . [of the firm] is a manifest forgery, is immaterial; if there had been no indorsement at all, the bank, after payment, would not have been debarred of the right of proving the simulation, and of showing that the payment was made to the real creditor."

It would seem that, unless the gross negligence of the bank would offset the fault of the drawer, the decision in favor of the bank might safely have been placed on the ground of the drawer's negligence; but, apart from the question of negligence, it does not seem that the bank ought to be allowed to ignore the payees whom the drawer named, and whom he intended to name; and the dissenting opinion takes that view.

In Maloney v. Clark, 6 Kan. 83, an impostor went to an attorney, impersonated the plaintiff's brother, and employed the attorney to write a letter to the plaintiff requesting him to remit money. The attorney in good faith wrote the letter, and the plaintiff forwarded to the attorney drafts made out to the order of his brother, and the attorney delivered them to the impostor. The drafts were purchased in good faith by the defendants from the impostor, who was identified to them as the payee by the attorney. The court held that, as between the plaintiff and the defendants, the loss must fall upon the former. This decision is put upon the broad ground that inasmuch as the attorney must be deemed the plaintiff's agent, the mistake which resulted in the fraud was the plaintiff's mistake, and he ought to bear the loss.

It seems scarcely satisfactory to dispose of the question in that manner without indicating the reason why the mistake should affect the rights of the parties. If the mistake operates to impose the loss upon the drawer, it would seem, since the question of negligence is eliminated, it must be either because, in consequence of it, the drawer really made the impostor the payee under the assumed name, or because he is estopped to deny that he did so. Unless one or the other of these theories be adopted, it is difficult to see how the drawer's mistake affects the check or the rights of the parties under it.

In Famous Shoe & Cloth Co. v. Crosswhite, 124 Mo. 34, 26 L. R. A. 568, 27 S. W. 397, a thief, who had stolen two mules, sold them to defendants and received a check in which the payee was described by an assumed name. He indorsed the check under that name, and sold it to plaintiff, who took it bona fide. The decision was in favor of plaintiff. The exact ground of the decision does not appear, but the court said, in reply to the argument of the defendants that they relied on the custom of the bank to require persons presenting checks to be identified, that such custom did not affect the rights of the plaintiff, but related alone to the identification of persons who present checks to banks for payment, and is no more than the usual precaution which banks adopt for their own protection. It does not appear in this case that the name assumed was that of the owner of the mules, or that the plaintiff suffered any injury from the assumption of that name, undistinguished from the fact that the mules had been stolen; and therefore he could scarcely deny that the person to whom he delivered the check was the real payee, although described by an assumed name.

Flore v. Ladd, 22 Or. 202, 29 Pac. 435, held, upon the assumption that a certificate of deposit, made out in the name of the actual owner of the money deposited, was delivered to

where a check has been lost or stolen and the payee's name has afterwards been forged; but it does not protect a depositor who is in fault, as in intrusting a check to one who he has reason to suppose will make a fraudulent use of it, or in so carelessly filling up a check that it may readily be altered, or in issuing a check to a fictitious person. It is confined to cases in which the depositor has done nothing to increase the risk of the bank. It should not apply when the check is issued to one whom the drawer intends to designate as the payee: First. Because in such a case the risk is not the ordinary risk assumed by the bank in its implied contract with its depositor, but a largely-increased risk, as it follows that a check thus fraudulently obtained will be fraudently used. The bank is deprived of the protection afforded by the fact that a bona fide holder of a check will exercise care to preserve it from loss or theft, which are the ordinary risks. There is thrown upon the bank the risk of antecedent fraud practised upon the drawer of the check, of which it has neither knowledge nor means of knowledge. Secondly. Because in such a case the intention with which the drawer issued the check has been carried out. The person has been paid to whom he intended payment should be made. There has been no mistake of fact, except the mistake which he made when he issued the check, and the loss is due, not to the bank's error in failing to carry out his intention, but primarily to his own error, into which he was led by the deception previously practised upon him.

It is somewhat surprising that the question presented by this case has not arisen more frequently. There are but few deci-

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another person who accompanied the latter to the bank and signed his name in the signature book apparently as his own, the bank was justified in paying the same to him upon his indorsing the name. The court said that the question was: With whom did the bank deal, and who was intended as the payee?

A bank, which, under general authority to pay its customer's accepted bills, pays a bill bearing the forged indorsement of the payee accepted by the customer, cannot charge the same up against the latter, although the indorsement was on the bill when it was accepted, and notwithstanding that the acceptor was accustomed to take precautions, before accepting bills, to verify the indorsements, where that custom was never communicated to the banker, and there is no evidence, direct or indirect, *of any communication to the banker* from which an authority to pay the bill without examination could be inferred. Robarts v. Tucker, 16 Q. B. 560, 3 English Ruling Cases, 680.

The facts involved in this case are so different from those involved in the cases previously cited, that it cannot be considered as a direct authority against the theory of actual intent adopted by them; but the case does seem somewhat analogous, since the acceptance of the bill, in view of the arrangement with the bank, was not unlike drawing a check on the *bank for the amount of the bill, payable to the* person who held the bill under the forged indorsements. In this case, the bill was presented for acceptance by a subsequent indorsee, and not by the person who forged the indorsement. The analogy would be closer if the latter had presented the bill.

In Bank of England v. Vagliano Bros. [1891] A. C. 107-172, 60 L. J. Q. B. N. S. 145, 173, 3 English Ruling Cases, 695, a clerk forged the name of a correspondent of his employers to a bill purporting to be drawn on them by the correspondent, and payable to the order of a *firm with which they had dealings, but which* had no connection with the transaction, and sent it to the firm, which accepted it. He afterwards obtained possession of it, and procured the money on it at the acceptor's bank. The court denied the right of the acceptor to recover from the bank, distinguishing the case from Robarts v. Tucker, 16 Q. B. 560, 3 English Ruling Cases, 680, *supra*, upon the ground that while the acceptors did not guarantee the genuineness of the indorsement, they did guarantee the genuineness of the drawer's signature, and, by reason thereof, the bank took an increased risk when it paid the bill without verifying the purported indorsement of the payee.

The case of Palm v. Watt, 7 Hun, 317, *infra*, does not seem to deny the doctrine that attributes to the drawer of a check who issues it to the wrong person an intent to make such person the payee. It will be observed that the court in that case took the view that, though the check was mailed in pursuance of a request by the impostor, and was received from him through the mail, it was not sent to him, but to the person whose name he had assumed, and that there was no delivery of, nor intention to deliver, the check to him.

Impostor assuming to act as agent of payee.

In the following cases the fraudulent scheme was essentially the same as that involved in the cases previously cited, in which the loss was imposed upon the drawer, except that the impostor, to whom the check was delivered, assumed to be the agent of the person by whose name the payee was described in the check; and the courts held that, as between the drawer and drawee, the loss must fall upon the drawee: Atlanta Nat. Bank v. Burke, 81 Ga. 597, 2 L. R. A. 96, 7 S. E. 738; German Sav. Bank v. Citizens' Nat. Bank, 101 Iowa, 530, 70 N. W. 769; First Nat. Bank v. Pease, 168 Ill. 43, 48 N. E. 160, Affirming 68 Ill. App. 562; Mechanics' Nat. Bank v. Harter (N. J. L.) 44 Atl. 715; Armstrong v. National Bank, 46 Ohio St. 512, 6 L. R. A. 625, 22 N. E. 866; Kuhn v. Frank, 10 Am. L. Record, 622, 6 Ohio Dec. Reprint, 1142; Brixen v. Deseret Nat. Bank, 5 Utah, 504, 18 Pac. 43.

See also First Nat. Bank v. Farmers' & M. Bank, 56 Neb. 149, 76 N. W. 430, *supra*.

In this class of cases, *i. e.*, when the impostor assumes to act as agent, as before remarked, the doctrine of actual intent does not apply, because the drawer did not regard the individual to whom he delivered the check as the payee, but merely as the agent of the payee. It would seem that the circumstances might be such that the delivery to an impostor assuming to act as agent of a real or fictitious person would constitute such negligence as to throw the loss upon the drawer: but there do not seem to be any cases that decide against the drawer on that ground when the check or draft was delivered to a purported agent. In Atlanta Nat. Bank v. Burke, 81 Ga. 597, 2 L. R. A. 96, 7 S. E. 738, nothing was said about negligence, but the court said that the fact that the drawer himself was deceived did not estop him

sions upon it, and none in this state. But the views which we have expressed are in entire harmony with the principles which we have recognized as governing the decision of cases arising from the forgery of notes and checks, and involving kindred questions. Among the more recent of these is *Iron City Nat. Bank* v. *Fort Pitt Nat. Bank*, 159 Pa. 47, 23 L. R. A. 615, 28 Atl. 197, in which the cases are reviewed by our brother Mitchell, and it is said by him: "It is always a good defense that the loss complained of is the result of the complainant's own fault or neglect; and it would require a statute in very explicit terms to do away with so universal a rule of law, founded on so incontestable a principle of justice." In *Bank of England* v. *Vagliano Bros.* [1891] A. C. 107, the bank had been induced to pay by notice from Vagliano Bros. of the drawing and acceptance of the draft, and, as the case differs from this in that important particular, it cannot be cited as a precedent. But the opinions of the lords are instructive on the questions involved in this case, and the principles announced by them would settle the contention in favor of the defendant. Lord Selborne said: "It is not (as I understand) disputed that there might, as between banker and customer, be circumstances which would be an answer to the prima facie case that the authority was only to pay to the order of the person named as payee upon the bill, and that the banker can only charge the customer with payments made pursuant to that authority. Negligence on the customer's part might be one of those circumstances; the fact that there was no real payee might be another." There are, however, decisions in other states which are

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The court, in Brixen v. Deseret Nat. Bank, 5 Utah, 504, 18 Pac. 43, held that the drawer was not negligent in delivering the check, which represented the proceeds of a loan, to a real-estate agent, whose character was good, for the purpose of having it delivered to the payee named therein, whose name had been forged to an application for a loan and to the mortgage papers.

In Armstrong v. National Bank, 46 Ohio St. 512, 6 L. R. A. 625, 22 N. E. 866, it was found by the trial court that the drawer was not careless or negligent, but the appellate court said that, even though the circumstances were calculated to arouse suspicion on the plaintiff's part, that fact would not modify the duty required of the bank in the matter of paying or not paying the check. It was also found by the trial court that the bank made the usual inquiries *respecting the identity of the person* who presented the check, and in other respects was ordinarily careful and prudent; but the appellate court said that finding must be taken in connection with the further fact that he was not the payee of the check, and that his indorsement without the genuine indorsement of the payee could confer no title upon the holder of the check, or any interest in it as against the drawer.

In Kuhn v. Frank, 10 Am. L. Record, 622, 6 Ohio Dec. Reprint, 1142, the court said that if the drawer, by any negligence or by any *course of dealing* between him and the drawee, had induced or contributed to the payment of the check, he would lose the right to recover from the latter; but held that, although the drawer was deceived by the impostor, he was not negligent.

Check or bill sent by mail.

It seems difficult to distinguish upon principle a case where the check or draft is mailed pursuant to communications from the impostor and delivered to him through the mails, from a case where the check is delivered to the impostor in person by the drawer, or the latter's agent.

And in Emporia Nat. Bank v. Shotwell, 35 Kan. 360, 57 Am. Rep. 171, 11 Pac. 141, *supra*, the drafts were sent in a letter addressed in the name the imposter had given (which was the name of the owner of the property), and the court held that, notwithstanding that fact, the plaintiff who had succeeded to the rights of the drawer of the drafts, must bear the loss rather than the drawee bank which paid it on the indorsement of the impostor.

In Palm v. Watt, 7 Hun, 317, however, the court took a contrary view. In that case an impostor assumed the name of a former companion, and by that name wrote letters to the relatives of the latter asking for assistance to enable him to return home. The impostor had *learned from the man whose name he had assumed* such particulars respecting his family as enabled him to deceive the latter with respect to his identity. Induced by the fraudulent statements in the letter, the mother of the person whose name was assumed purchased of the defendants a check payable to the order of her son, and mailed the same to him. The letter was taken from the postoffice by the impostor, who indorsed the check in his assumed name, and the check afterwards came into the hands of the plaintiff, a bona fide holder. Before the check was presented for payment the fraud had been discovered and payment stopped. The plaintiff sued the defendants (the drawers), but the court held that he could not recover because he acquired no title to the check, and because the defendants remained liable on the same to the real payee. The courts said that the criminal fraud of the impostor induced the defendants to send their check, not to him, but to the person whose name he assumed, and to whom it was made payable. There was no delivery of, or intention to deliver, the check to the impostor, and no authority conferred upon him to take the letter inclosing it from the postoffice, or make any disposition of the check. His act in receiving and opening the letter was in itself a criminal offense, and when he had, by the crime of false personation, obtained possession of the check, he acquired no authority to dispose of or indorse it. His act in indorsing it was a palpable forgery for which, upon the facts disclosed, he could without doubt have been convicted of that crime. The defendants were guilty of no negligence which led to the impostor's possession of the property. They did not deliver, nor intend to deliver, it to him. It is simply a case where, by criminal fraud committed by a stranger, the defendants were induced to send by letter, to the person whose name was assumed, addressed to him, a check payable to his order; and the guilty person who thus induced them to do that act got possession of the check by another crime, and then committed forgery by indorsing it. It was urged that the possession of the letter which inclosed the check, and which was addressed and written to the person whose name the impostor had assumed, enabled the latter more easily to personate the former, and thus deceive the person to whom he indorsed the

directly in point. In *Emporia Nat. Bank* v. *Shotwell*, 35 Kan. 360, 11 Atl. 141, the facts are almost identical with those in this case. An unknown person, who represented himself to be Guernesy, who was the owner of a quarter section of land, obtained from Shotwell a loan secured by mortgage on Guernesy's land, and received from Shotwell in payment a draft drawn to the order of Guernesy. He indorsed Guernesy's name on the draft, and sold it to the bank. In an action by Shotwell to recover of the bank the amount received by it on the draft, it was held that, although Shotwell was deceived in the transaction, the person with whom he dealt was the person intended by him as the payee of the draft, designated by the name he assumed in obtaining the loan, and that his indorsement was the indorsement of the payee named. It is said in the opinion: "The vital point in this case is that Shotwell intended the draft to be sent to the party executing the notes and mortgage, and intended it to be paid to the person to whom he sent it, and whom he designated by the name of Daniel Guernesy because that was the name he assumed in executing the notes and mortgages; and therefore the national bank is protected in paying the draft to the very person whom Shotwell intended to designate by the name of Daniel Guernesy." In *Maloney* v. *Clark*, 6 Kan. 82, the plaintiff was induced to send a draft drawn to the order of his brother to a stranger, who in the correspondence had personated his brother. The stranger indorsed the name of the plaintiff's brother on the draft, and sold it to the defendants, who were bankers. It was held that under these facts the plaintiff could not recover. In *Robertson* v. *Coleman*, 141

check. The court said that that was no more true than it would be in the case of any thief who had stolen a letter addressed to a third party inclosing a check to the order of such party, and who brought the check to a bank with such stolen letter as the evidence of his identity. In such a case very clearly the bank paying the check to the forger would be responsible for the genuineness of the indorsement, and any intermediate buyer occupies the same position. It was also held that the fact that the impostor had a short time before obtained by the same criminal process a check upon which he had forged the indorsement and obtained money thereon from the same person to whom he sold the check, and that the check on reaching the drawees had been paid, does not affect the case, because no knowledge of the fraud or forgery in the first check and its negotiation was brought home to the defendants before sending the check.

The foregoing case is almost identical in its facts with Maloney v. Clark, 6 Kan. 83, *supra*, except that in that case the drafts were sent to an attorney and by him delivered to the impostor. The court held that the attorney, in delivering the drafts, acted as the agent of the person who sent them.

The five cases next cited are distinguishable from Emporia Nat. Bank v. Shotwell, 35 Kan. 360, 57 Am. Rep. 171, 11 Pac. 141; Maloney v. Clark, 6 Kan. 83; and Palm v. Watt, 7 Hun, 317,—*supra*, by the fact that the letters inclosing the checks or bills were not sent in pursuance of communications from the impostor, as was the fact in those cases.

Graves v. *American Exch. Bank*, 17 N. Y. 205, was an action by the payee of a bill of exchange against the drawee bank for the conversion of the bill. The payee had directed his debtor in another state to send him the amount of the debt by a check, or in any other safe way. The letter inclosing the draft was directed to the wrong postoffice, but the mistake was corrected, and it was sent to the proper postoffice, from which it was delivered to a person of the same name as the payee, but who had no right to the draft. This person indorsed the draft, and it was finally paid by the drawee bank after it had been indorsed by other persons. The decision was in favor of the plaintiff, and rests upon the ground that the draft, at least upon reaching the proper postoffice, became the property of the person to whom it was directed, and for whom it was intended. It appeared that the person to *whom the draft was delivered* by the postoffice authorities was at the place to which the letter was addressed, although the letter was delivered to him from the other postoffice. A dissenting opinion takes the position that the payee occupied no better position than the drawer, and that, as between the drawer and the drawee bank, the loss ought to fall upon the former because of his mistake in misdirecting the letter.

In Indiana Nat. Bank v. Holtsclaw, 98 Ind. 85, a check had been *mailed to plaintiff*, but was misdirected, and came to the hands of another person of the same name, who forged the indorsement and sold it to a bank. The court held that the plaintiff might maintain an action against the latter bank, such bank having received the money upon it.

In Shaffer v. McKee, 19 Ohio St. 526, a draft payable to the order of plaintiff was mailed to her. It was stolen from the mails, and the indorsement forged, and the draft sold to defendant, who collected the amount. It was held that the plaintiff might recover from defendant as for money received for his use.

In Bank of Commerce v. Ginocchio, 27 Mo. App. 661, a New York draft indorsed by the payees to the order of a certain person, and inclosed in a letter addressed to him at Kansas City, Missouri, without any addition indicating his occupation, profession, residence, or *place of business*, was received by another person of the same name, and indorsed and negotiated by him for value, and was finally purchased by plaintiff. The drawee, pursuant to instructions, refused the payment, and the plaintiff brought an action for negligence against the payee, proceeding upon the theory that the draft was of no value whatever. The court decided against the plaintiff upon the ground that the defendant's negligence, if any, was not the proximate cause of the loss.

In Talbot v. Bank of Rochester, 1 Hill, 295, the owner of a certificate of deposit indorsed it to a certain firm, and, without their knowledge, mailed it to them. It was stolen from the mail, and the indorsement forged, and it was then acquired by a bona fide person, who collected it. The court held that the owner could maintain an action against the latter for conversion, or for money had and received.

Applicability of rule as to fictitious payees.

The rule that a check payable to a fictitious person is, in effect, payable to bearer, would ordinarily be sufficient to throw the loss upon a drawer who issues a check to an impostor, at least where the payee named is fictitious, but for the fact that it is generally

Mass. 231, 55 Am. Rep. 471, 4 N. E. 619, a person who assumed the name of Barney took to Coleman, an auctioneer, a stolen horse and buggy, to be sold. Before selling them, Coleman made inquiry, and received a favorable report of the standing of the real owner of the assumed name. After the sale he gave a check, drawn to the order of Barney, to the person for whom he sold the team, who indorsed it and parted with it for value. Payment of the check having been stopped, suit was brought by the holder against Coleman, and a recovery had. In the opinion it was said: "It is clear from the facts that, although the defendants may have been mistaken in the sort of man the person they dealt with was, this person was . . . intended by them as the payee of the check, designated by the name he was called in the transaction, and that his indorsement of it was the indorsement of the payee of the check by that name." It would follow, under this reasoning, that if the check had been paid by the bank it would have been a good payment. In the case of *United States v. National Exch. Bank*, 45 Fed. Rep. 163, decided by the circuit court of the United States for the eastern district of Wisconsin, it was held that a bank was not liable for the payment of a check on a forged indorsement where the person who committed the forgery and received the money was in fact the person to whom the drawer delivered the check, and whom he believed to be the payee named. Shuman had, by fraud, obtained possession of a postoffice money order drawn in favor of Erben, on which he forged Erben's indorsement, and in payment of the order received a check from the postmaster, drawn on the bank defendant, to the order

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held not to apply where the drawer supposes the payee to be a real person; and in the cases previously cited the drawer, of course, supposed that the payee named was a real person.

In Kohn v. Watkins, 26 Kan. 691, 40 Am. Rep. 340, however, the rule was applied to drafts which an impostor, by signing fictitious names to applications for loans, induced defendants to draw to the order of fictitious payees, the drawer believing them to be real persons. The court held that, as between the drawer and a bona fide holder, the drafts must be treated as if payable to bearer, and the drawer must bear the loss. There were other drafts drawn payable to the order of real persons, and forwarded to the impostor, who assumed to be the agent of such persons. The plaintiff contended that, inasmuch as such persons had no knowledge of, or interest in, the drafts, they must be deemed fictitious persons for the purposes of the transaction, but the court held that the rule did not apply as to those drafts, because the payees named were real persons, and were present to the drawer's mind, when he drew the drafts, as the parties to whose order they were to be paid.

Clutton v. Attenborough [1897] A. C. 90, 66 L. J. Q. B. N. S. 122, 75 L. T. N. S. 556, 45 Week. Rep. 276, also held that a check payable to the order of a person who did not exist, although the drawer supposed he did, was within the English statute providing that where the payee is a fictitious or nonexisting person the bill may be "treated as a bill payable to bearer."

In Phillips v. Mercantile Nat. Bank, 140 N. Y. 556, 23 L. R. A. 584, 35 N. E. 892, Affirming 67 Hun, 378, 22 N. Y. Supp. 254, also, the rule was applied. In that case a check was drawn by the cashier of a bank in its name upon another bank for the purpose of speculating in stocks, without the knowledge of the officers of his bank, the names of the payees being actual customers, but such customers having no knowledge of the checks or connection with the transaction. The court held that the payees must, for the purposes of the check in question, be deemed fictitious. The court below held that the cashier's knowledge that the payees named did not represent real persons was chargeable to his bank, and that view was probably taken by the court of appeals, although that point is not discussed.

In Chism v. First Nat. Bank, 96 Tenn. 641, 32 L. R. A. 778, 36 S. W. 387, the court held that a drawee bank which paid a draft relying on a forged indorsement thereon of the name of a fictitious person to whom the payee had indorsed it honestly as the result of a fraud practised upon him, is not thereby relieved from liability to the payee. The court held, contrary to the view taken in Kohn v. Watkins, 26 Kan. 691, 40 Am. Rep. 336, and Clutton v. Attenborough [1897] A. C. 90, 66 L. J. Q. B. N. S. 122, 75 L. T. N. S. 556, 45 Week. Rep. 276, that the rule with reference to fictitious indorsees did not apply, because the payee, when he indorsed the check, believed in the existence of the indorsee.

So, also, Shipman v. Bank of State, 126 N. Y. 318, 12 L. R. A. 791, 27 N. E. 371, *infra*, holds the rule does not apply where the drawer of the check believes that the name of the payee represents a real person.

For notes: *Negotiable paper; use of fictitious names*,—see, Armstrong v. Pomeroy Nat. Bank (Ohio) 6 L. R. A. 625; *Use of fictitious name as affecting validity of instrument*—see Wiehl v. Robertson (Tenn.) 39 L. R. A. 423.

Theory of estoppel.

In Forbes v. Espy, 21 Ohio St. 474, a person, for the purpose of smuggling goods, had assumed a false name. He sold some of the smuggled goods to a firm, which, in payment, sent him a bank draft purporting to be payable to his order under the assumed name. He indorsed it and sold it to plaintiff. The payment of the bill was stopped, and the plaintiff brought an action against the bank which drew the draft. The parties who purchased the goods were compelled to pay the duty of which the government had been defrauded. The opinion says the question involved in the case is whether the defendant could set up as against the plaintiff (a bona fide holder) the fraud practised upon the firm. It was conceded that they could if the purchasers themselves could do so, and it was also conceded that if the legal title to the bill was in the plaintiff the defense could not be sustained. The court passed over the question whether the legal title was really in the plaintiff, and decided in plaintiff's favor, upon the ground that the purchasers were estopped from denying that the legal title was in him.

The adoption of the theory of estoppel instead of that of actual intention would seem to avoid the difficulty, inherent in the latter theory, of truthfully attributing to the drawer of the check an intention that the person to whom he delivers it shall be the payee, notwithstanding that the check itself describes the payee by the name of another person from whom the consideration purports to come, and also avoids

of Erben, on which he forged Erben's indorsement, and it was paid by the bank. This decision, as the others cited, is put upon the ground that the intention of the drawer of the check was that it should be paid to the person to whom he delivered it. There are a number of other cases which more or less directly recognize the principle on which these decisions are based, but in which there is no direct ruling on the subject, and we have found none which express a contrary view.

The facts of this case do not, we think, bring it within the rule that a bank paying a check to order on a forged indorsement may not charge the payment to the drawer's account, for the reason that the check was issued to the person whom the drawer intended to designate as the payee. If not within the rule, the plaintiff has no standing whatever. It is a perverted statement of the whole transaction to say that the check was intended for Dr. Herman S. Bissey, and that he alone was entitled to receive payment. Dr. Bissey had no more right to the check than had Ashley. He had given nothing for it. No one was entitled to it, and, had the truth been known, it would not have been issued. Under the supposed facts on which the trust company acted, Ashley was the owner of the property, he had executed a mortgage, and was entitled to payment. The clear intention was to pay him, although there was a mistake as to the facts on which the intention was based. Nor is the solution of the question involved to be sought in determining whether the bank was negligent in dealing with its depositor, Rogers. This was suggested at the argument, but mainly as a makeweight. The case was not presented or argued on that ground, and in view of the principles by which the question of liability must be determined, and of the facts as shown at the trial, it could not have been. The true ground of liability, if any existed, was that the bank collected of the trust company a check drawn to order, on which the indorsement was forged. Between the bank and the trust company, as the drawer of the check, no relation, contractual or otherwise, existed. The drawer of a check cannot maintain an action against one who collects it on a forged indorsement from the bank on which it was drawn, although the bank paying the check may. The remedy of the drawer is against the bank which pays his check, and the bank's remedy is against the person to whom it paid. The liability of the party collecting the check

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the obvious absurdity of the position, taken, impliedly at least, in Dodge v. National Exch. Bank, 50 Ohio St. 1, *supra*, of imposing the loss upon the drawer, where he was completely deceived, and relieving him from it where he was not completely deceived, but intended to devolve upon the bank the duty of having the person to whom the check was delivered identified as the person whose name is given in the check. It may, perhaps, be urged that there can be no estoppel in such a case, because the bank at the time it cashes the check is not aware that the check was delivered to the impostor rather than to the person whose name it bears, and that the appearance to the bank when the check is presented is exactly the same as it would be if the check had in fact been originally delivered to the payee named therein, and had then been stolen by the impostor and the indorsement forged, in which case, concededly, the bank would be liable. The following considerations are suggested in reply to that argument: When the bank pays a check upon a forged indorsement it does so in the belief that the person who indorsed it was the person whom the drawer intended to designate as payee, and this is so whether the check was originally delivered to the impostor, or stolen by him after delivery to the true payee. This belief is largely, and, when the person who presents the check is not identified, is solely, induced by the fact that the check is, or was, at the time the impostor indorsed it, in his possession; and the bank in either case acts on the appearance created by that fact. But when the check is originally delivered to the true payee, and is then stolen and the indorsement forged, the appearance created by the fact that the check has been in the possession of the person who indorsed it is not due to any act on the part of the drawer, and therefore there is no estoppel against him; but when the drawer delivers the check to the impostor in the belief that he is the person named as payee, that appearance is due to the act of the drawer, and, therefore, if the other elements of an estoppel are present, it is not apparent why an estoppel cannot be successfully asserted. Sup. 50 L. R. A.

pose a retail merchant sets up an estoppel against a wholesale firm to deny that a certain person represented it, as its traveling salesman, and relies upon the fact that the firm had intrusted him with the usual outfit furnished its salesmen; would it be necessary for the merchant, in order to establish an estoppel, to show that he knew at the time he acted on the appearance created by the fact that the person was in possession of the outfit, that the same had been intrusted to him by the firm, and that he had not obtained possession of it in any other way? True, the outfit, for aught the merchant knew, may have been stolen. But the fact is, the firm intrusted it to the supposed salesman, and by so doing created the appearance by which the merchant was deceived. Of course, if, as a matter of fact, the outfit had been stolen, there would be no basis for an estoppel, because, although the appearance to the merchant was just as deceptive, it was not due to an act of the firm.

Summary.

Whatever the true theory may be, it is apparent from the foregoing cases that the drawer of a check, draft, or bill of exchange, who delivers it to an impostor, supposing him to be the person whose name he has assumed, must, as against the drawee or a bona fide holder, bear the loss where the impostor obtains payment of, or negotiates, the same. On the other hand, if the check, draft, or bill is delivered to an impostor who has assumed to be the agent of the person named as payee, the loss will not fall on the drawer, at least if he was free from negligence, and there was a real person bearing that name, whom he intended to designate as payee.

Of course, even where a drawee bank is primarily liable for the loss, the drawer may, by reason of his subsequent negligence in examining vouchers returned to him by the bank, become liable, and thus relieve the bank. For a note on duty of depositors in respect to forged checks charged to him by the bank, *see note* to First Nat. Bank v. Allen (Ala.) 27 L. R. A. 426. G. H. P.

arises from his implied warranty of the indorsement. This liability is founded on contract, and not on negligence, and it exists, if at all, whether there was negligence or not. But if we consider the question in this light the plaintiff has no case. The fraud was, in effect, consummated when the check was delivered to Ashley. He would have received money instead of a check if he had asked for it, or he could have drawn the money in the banking department, in an adjoining room. Any right of the trust company to recover must rest on the assumption of its entire good faith and innocence, and, if it gave a check to Ashley with any reservation or doubt as to his honesty in the transaction, it is estopped by the fact that it gave, to one of whom it had reason to be suspicious, the means of perpetrating a fraud on others. The officers of the trust company, of course, had no doubt. They acted in entire good faith, and, it may be conceded, with ordinary prudence; but the loss was occasioned by their error, and there is no reason, legal or equitable, why it should be shifted to another.

The judgment is reversed.

Dean, J., dissenting:

A man representing himself as John Ashley called upon Dr. Herman S. Bissey, at his residence, No. 1630 North Sixteenth street, in the city of Philadelphia. He was entirely unknown to Bissey, but pretended that he desired to purchase a house and lot, No. 2352 North Broad street,—a property owned by Bissey, and which he wanted to sell. They agreed on the terms, and Ashley got from Bissey his deed for the premises, on the pretense that he wanted to have it examined, and took it away with him; first, however, paying $5 on account. With the deed in his possession, Ashley called upon R. Taylor Middleton, a real-estate broker of unquestioned good character, and, representing himself as Dr. Herman S. Bissey, the grantee in the deed, opened with him negotiations for a loan of $5,000 on a mortgage of the property. Bissey was unknown to Middleton, and the latter, assuming the truthfulness of the representations, introduced Ashley to the Land Title & Trust Company, this plaintiff, as Bissey, the grantee in the deed, that he might procure a title insurance policy on the premises, and also as a party who might place for him the mortgage loan. Bissey was wholly unknown to the officers of the company. The title was insured, and the loan granted. The "title department" of the company took the mortgage, and delivered to the pretended mortgagor, Bissey, its check, as follows:

Philadelphia, Nov. 1, 1897.

The Land Title and Trust Company:

Pay to the order of Herman S. Bissey four thousand nine hundred and twenty-two and 25/100 dollars, pro. of mtg. on No. 2352 N. Broad St.

William R. Nicholson, President.

J. Lord Rigby, Settlement Clerk.

$4,922.25.

The pretended Bissey then forged the name of Herman S. Bissey on the back of the check, and followed this with the indorsement of name G. B. Rogers, and presented it for deposit to the account of the latter at the Northwestern National Bank, this appellant. The bank accepted it, indorsed it for collection, and by its messenger sent it back to the title company, by whom it was paid in the ordinary course of business. The man who assumed the name of Rogers soon after, by checks on the national bank, drew out the money. In about six months thereafter the title company discovered the forgery of Bissey's name, and the worthlessness of the mortgage. Demand for payment being refused by the national bank, this suit was brought. There was no dispute as to the facts. The court below directed the jury to find for plaintiff, and we have this appeal by the national bank, defendant, assigning for error the peremptory instruction of the court below.

A majority of my brethren are of opinion the court erred. I think it was right. I put the case wholly upon the principle or rule that, where one of two innocent persons must suffer by the wrong of a third, he shall stand the loss whose fault or neglect made the loss possible. Now, notice the facts, as concerns the Land Title Company: It transacts business of millions of dollars annually in a large city, insures titles, and places mortgages. Probably not one tenth of those who deal with it are personally known to its officers. How shall it identify them, and thus guard against swindlers? It seems to me, the only practicable way is to have its customers introduced by reputable business men, who are known to the officers. That was the method pursued here. Mr. Middleton, well known to the bank, who had himself been imposed upon, introduced the swindler to the title company as Dr. Herman S. Bissey, the owner of premises No. 2352; and this pretended Bissey had the deed in his possession. Shall the company call in other reputable business men to corroborate one whose prudence and integrity are unquestioned? The company, in the exercise of all the care that any reasonable rule of law or business conduct required, necessarily assumed that Mr. Middleton represented the truth when he said to them, in effect, "This man is Dr. Herman S. Bissey, the owner of premises No. 2352 North Broad street." It is argued that if the title company had paid in bank bills, instead of by check, it would have been the loser. A sufficient answer to this is that it did not pay in bank bills, but by check. A conjecture as to what might have been the case on some other state of facts helps us not in determining the issue. We may conjecture that if, without being identified by one well known to it, the title company had assumed the identity of Bissey from the mere possession by him of the deed, the loss would have been its own. But, to impose the penalty, we must assume some degree of fault or neglect on part of the title company. The proof is

undisputedly the other way. It did not pay the swindler the money. It did not deliver to him its check until his identity was vouched for by one in every way worthy of belief. The pretended Bissey had the check. He, with very rare exceptions, could not have drawn the money at any bank teller's window in this city without proof of identity; that is, that he was Dr. Herman S. Bissey, the payee. It is argued that if the swindler had gone from the "title department" to the company's paying teller, in the same building, it would have been cashed without proof of identity. If he had done so, and received the money, that would have been the fault of the paying teller; and, of course, the title company would have had to bear the loss. But he did not present it to the paying teller of the drawer. Why? Because, it is fair to assume, he wanted no questions asked by one who might know the real Bissey, or require that someone vouch for him as the real Bissey. *In fact, he had* concocted and prepared a plan to cheat the defendant bank,—one by which he could get the check cashed without identification. We take the testimony of defendant's cashier. He says the check drawn November 1 in favor of Bissey was received by him on deposit, November 3, from George B. Rogers, it having been previously indorsed by Bissey. Being the second indorser, the cashier had a right to assume that Rogers guaranteed the genuineness of Bissey's signature, the payee; *but who was Rogers*, who guaranteed the genuineness of the indorsement of the payee in a $5,000 check? The cashier says: A man representing himself to be Rogers called at the bank, with his wife, less than three weeks before, and rented a safe-deposit box, with instructions that his wife was to have access to it. He had no introduction, but said he lived in the neighborhood, and told a "pretty straight story." The bank designated a box for him. The assumed Rogers then came several times, and apparently used the box; then, on November 3, as we have said, less than three weeks afterwards, deposited the Land-Title check; in about four weeks more, drew it all out, but 25 cents. The bank had not heard of or known him before the renting of the box. It has not heard of him since he drew the last check. Whether his real name was Rogers, except from the "pretty straight story" he told the cashier, no one knows, for the bank made no further inquiry. Whether he ever did business in Philadelphia, or resided in the neighborhood of the bank, no one knows, for inquiry since has resulted in no information. Yet this defendant bank, on the guaranty of a total stranger, accepts as genuine the forged indorsement of Bissey, and, in collecting the check, represents to the Land Title Company, by its own indorsement, that the preceding ones are genuine. It could not have got the money out of which it was defrauded, unless it had done so. On these facts,—and not a single one of them is disputed,—whose neglect enabled the wrongdoer to successfully perpetrate the cheat? The title company did not accept a "pretty straight story" from him. Middleton had to introduce and vouch for him. He did not present the check to the paying teller of that company when he had possession of it; for, as stated by Mr. Nicholson, the president, that officer had nothing whatever to do with, or knowledge concerning, the operations of the real-estate department. The wrongdoer believed or feared identification would be required there. *He preferred the* bank, which believed a total stranger's "pretty straight story;" and the result shows that, while his conduct was crooked, his judgment was correct. Everyone connected with this transaction was deceived by *the pretexts of the swindler*, except the Land Title Company,—the one now, by the judgment of this court, made to suffer. Dr. Bissey, allured by the prospects of a sale, trusts a total stranger with possession of his deed. Mr. Middleton believes he is Dr. Bissey, because he says so and exhibits Bissey's deed. The defendant believes he is Rogers, because he says so, rents him a box, opens with him an account, and accepts his say-so as to the genuineness of Bissey's forged signature, undoubtedly forged by himself. The title company believes nothing he says. It does believe what Mr. Middleton says, for it could not do otherwise without practically stopping business. The fraud was only possible, in view of the undisputed facts, because of the childish credulity and consequent neglect of the most ordinary business precautions by defendant. I would affirm the judgment.

Green, Ch. J: I concur in the foregoing dissenting opinion.

A petition to amend the judgment having been filed, the following **Per Curiam** opinion was handed down May 29, 1900:

In re petition to amend the judgment of the supreme court by adding thereto the words "and a *venire facias de novo* shall issue." Judgment amended by granting new venire as prayed for.

A. G. KNISELY, Treasurer of Dauphin County,

v.

David W. COTTEREL, *Appt.*

Edward R. WOOD *et al.*, *Appts.*,

v.

William S. VARE.

(196 Pa. 614.)

1. A tax upon venders of merchandise,

NOTE.—As to necessity of uniformity in license or privilege tax, see Chaddock v. Day (Mich.) 4 L. R. A. 809, and *note;* Simrall v. Covington (Ky.) 9 L. R. A. 556; Magenau v. Fremont (Neb.) 9 L. R. A. 786; Sayre v. Phillips (Pa.) 16 L. R. A. 49; *Ex parte* Williams (Tex. Crim. App.) 21 L. R. A. 783; Denver City R. Co. v. Denver (Colo.) 29 L. R. A. 608; Ottumwa v. Zekind (Iowa) 29 L. R. A. 734;

graduated according to the amount of annual sales, is not unconstitutional for want of uniformity, even if it is regarded as a tax on property.

2. **A tax is not imposed specifically on property,** but on the business of selling, when it is imposed on dealers in merchandise, and graduated according to the amount of their annual sales.

3. **The classification of dealers of merchandise** into retail and wholesale dealers and dealers at any exchange or board of trade, and the imposition of taxes upon these classes at different rates, do not violate the constitutional requirement of uniformity.

4. **The generality of a tax law, the main provisions of which are uniform** and applicable over all the state, is not destroyed by merely incidental differences in the number and mode of appointment of appraisers in the counties generally and in cities of the first class, so as to make the law conflict with Const. art. 9, § 1, requiring a tax law to be "general," or art. 3, § 7, prohibiting local or special laws regulating the affairs of counties and cities, or prescribing the powers and duties of their officers.

5. **A provision in a statute that certain matters shall remain as now fixed by existing law,** when it might have been omitted without any effect whatever, does not make the statute offend against a constitutional provision that all laws revived, amended, or extended shall be re-enacted at length.

6. **The individual liberty of the citizen is not invaded,** in violation of his constitutional rights, by a statute taxing venders of merchandise according to the amount of their annual sales.

(July 11, 1900.)

APPEAL by defendant from a judgment of the Court of Common Pleas for Dauphin County in favor of plaintiff in an action brought to enforce a license tax on merchants. *Affirmed.*

APPEAL by plaintiffs from a decree of the Court of Common Pleas, No. 2, for Philadelphia County in favor of defendants in a suit brought to enjoin the enforcement of the mercantile license tax act of May 2, 1899. *Affirmed.*

The facts are stated in the opinion.

Mr. **Lyman D. Gilbert,** for appellant Cotterel:

The act of assembly of May 2, 1899, is unconstitutional in the taxing method it proposes.

The said act of assembly taxes the property of the appellant, and is unconstitutional because it is in violation of § 1 of article 9 of the Constitution of Pennsylvania, providing that "all taxes shall be uniform upon the same class of subjects, within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws."

Allentown v. *Gross*, 132 Pa. 319, 19 Atl. 269; *Williamsport* v. *Wenner*, 172 Pa. 173, 33 Atl. 544.

This court plainly and directly declared in *Williamsport* v. *Wenner*, 172 Pa. 173, 33 Atl. 544, that a license tax graduated by the amount of annual sales is a tax on property, estimated by the volume of annual sales.

This was a reutterance of the decision in the case of *Allentown* v. *Gross*, 132 Pa. 319, 19 Atl. 269.

As a property tax it is fatally defective because it lacks constitutional uniformity.

The distinction made, which is legislatively regarded as the justification for this arbitrary taxation, is solely a difference in the persons to whom that vending is done.

This is not a uniform method of classifying property for taxation.

Another feature of illegal tax discrimination which this statute proposes to introduce depends exclusively and arbitrarily upon the place where the sales are made, irrespective of those who participate in them, either as venders or as vendees.

Where the parts of a statute are so materially connected and dependent as to warrant a belief that the legislature intended them as a whole, and that if all could not be carried into effect the legislature could not pass the residue independently, if some parts are unconstitutional and void, all the provisions which are thus dependent are void.

Warren v. *Charlestown*, 2 Gray, 84; *Com. ex rel. Atty. Gen.* v. *Potts*, 79 Pa. 164; *Philadelphia* v. *Barber*, 160 Pa. 123, 28 Atl. 644.

It was the purpose, and it has been the effect, of the 9th article of the Constitution to forbid the continuance and prevent the repetition of the unjust system of taxation which prevailed before the adoption of the constitution.

As a property tax it is fatally defective because it is not levied and collected under a general law as required by the 1st section of the 9th article of the Constitution.

Wheeler v. *Philadelphia*, 77 Pa. 338.

The exclusion of the merchandise venders of the city of Philadelphia from certain provisions of this statute makes the act in question a local law.

Morrison v. *Bachert*, 112 Pa. 322, 5 Atl. 739; *Weinman* v. *Wilkinsburg & E. L. Pass. R. Co.* 118 Pa. 192, 12 Atl. 288; *Ayars's Appeal*, 122 Pa. 266, 2 L. R. A. 577, 16 Atl. 356; *Re Ruan Street*, 132 Pa. 257, 7 L. R. A. 193, 19 Atl. 219; *Re Wyoming Street*, 137 Pa. 494, 21 Atl. 74; *Pittsburgh's Petition*, 138 Pa. 401, 21 Atl. 757, 761; *Scranton* v. *Whyte*, 148 Pa. 419, 23 Atl. 1043; *Safe Deposit & T. Co.* v. *Fricke*, 152 Pa. 233, 25 Atl. 530; *Philadelphia* v. *Westminster Cemetery Co.* 162 Pa. 105, 29 Atl. 349; *Chalfant* v. *Edwards*, 173 Pa. 246, 33 Atl. 1048.

The act of assembly of May 2, 1899, is unconstitutional because it is in violation of

State *ex rel.* Toi v. French (Mont.) 30 L. R. A. 415, with *note* on limit of amount of license fees; Carrollton v. Bazzette (Ill.) 31 L. R. A. 522; *Re* Haskell (Cal.) 32 L. R. A. 527; State v. Harrington (Vt.) 34 L. R. A. 100; Singer Mfg. Co. v. Wright (Ga.) 35 L. R. A. 497; Banta v. Chicago (Ill.) 40 L. R. A. 611; State v. Gardner (Ohio) 41 L. R. A. 689; Phœnix Assur. Co. v. Fire Department of Montgomery (Ala.) 42 L. R. A. 468; Fleetwood v. Read (Wash.) 47 L. R. A. 205; and State *ex rel.* Wyatt v. Ashbrook (Mo.) 48 L. R. A. 265.

the 7th section of article 3 of the Constitution, providing that "the general assembly shall not pass any local or special law; regulating the affairs of counties, cities, townships, wards, boroughs, or school districts; creating offices, or prescribing the powers and duties of officers in counties, cities, boroughs, townships, election or school districts."

This law disregards the provisions of the Constitution, in that it locally regulates the affairs of counties, and is therefore unconstitutional.

Morrison v. *Bachert*, 112 Pa. 322, 5 Atl. 739; *Wheeler* v. *Philadelphia*, 77 Pa. 338; *Re Ruan Street*, 132 Pa. 257, 7 L. R. A. 193, 19 Atl. 219; *Re Wyoming Street*, 137 Pa. 494, 21 Atl. 74; *Weinman* v. *Wilkinsburg & E. L. Pass. R. Co.* 118 Pa. 192, 12 Atl. 288; *Ayars's Appeal*, 122 Pa. 266, 2 L. R. A. 577, 16 Atl. 356; *Pittsburgh's Petition*, 138 Pa. 401, 21 Atl. 757, 761; *Scranton* v. *Whyte*, 148 Pa. 419, 23 Atl. 1043; *Safe Deposit & T. Co.* v. *Fricke*, 152 Pa. 233, 25 Atl. 530; *Philadelphia* v. *Westminster Cemetery Co.* 162 Pa. 105, 29 Atl. 349; *Chalfant* v. *Edwards*, 173 Pa. 246, 33 Atl. 1048.

Messrs. **Alexander Simpson, Jr.,** and **M. Hampton Todd** for appellants Wood *et al.*

Messrs. **John P. Elkin,** Attorney General, **Frederic W. Fleitz, M. E. Olmsted,** and **A. C. Stamm,** for appellees:

The act of 1899 does not offend against the constitutional requirement as to uniformity.

The subjects of taxation are "persons, property, and business."

State Tax on Foreign-held Bonds, 15 Wall. 300, 21 L. ed. 179.

The tax in question being measured by "each dollar of the whole volume, gross, of business transacted annually," it is, of course, a tax upon business.

Durach's Appeal, 62 Pa. 494.

The power of classification for license-tax purposes has always been exercised in Pennsylvania.

The manner in which sales are made has likewise always been a consideration for classification.

Com. v. *Delaware Division Canal Co.* 123 Pa. 594, 2 L. R. A. 798, 16 Atl. 584; *Kittanning Coal Co.* v. *Com.* 79 Pa. 104; *Com.* v. *Delaware & H. Canal Co.* 43 Pa. 295.

Treated as a tax on property, there is no objection to the classification provided in the act. The tax on capital stock is a tax on property.

Com. v. *Standard Oil Co.* 101 Pa. 119; *Com.* v. *New York, P. & O. R. Co.* 188 Pa. 169, 41 Atl. 594.

And yet the property of some manufacturing companies is taxed, while that of others is untaxed.

Com. v. *Delaware Division Canal Co.* 123 Pa. 594, 2 L. R. A. 798, 16 Atl. 584; *Com.* v. *Northern Electric Light & Power Co.* 145 Pa. 105, 14 L. R. A. 107, 22 Atl. 839; *Com.* v. *Germania Brewing Co.* 145 Pa. 83, 22 Atl. 240; *Germania L. Ins. Co.* v. *Com.* 85 Pa. 513; *Fox's Appeal*, 112 Pa. 337, 4 Atl. 149.

The act of 1899 is not prohibited class legislation.

Com. v. *Delaware Division Canal Co.* 123 Pa. 594, 2 L. R. A. 798, 16 Atl. 584; *Com.* v. *Martin*, 107 Pa. 185; *Com.* v. *Philadelphia County*, 157 Pa. 531, 27 Atl. 546.

The act does not violate the rights of persons or property.

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

These two cases may conveniently be considered together, as both raise the same question of the constitutionality of the act of May 2, 1899 (P. L. 184), "to provide revenue by imposing a mercantile license tax on venders of or dealers in goods," etc. The act is frankly and professedly a revenue act, and therefore we have no complication with questions under the police power. The act provides that "each retail vender of or retail dealer in goods, wares, and merchandise shall pay an annual mercantile license tax of two dollars, and all persons so engaged shall pay one mill additional on each dollar of the whole volume, gross, of business transacted annually. Each wholesale vender of or wholesale dealer in goods, wares, and merchandise shall pay an annual mercantile license tax of three dollars, and all persons so engaged shall pay one-half mill additional on each dollar of the whole volume, gross, of business transacted annually. Each dealer in or vender of goods, wares, or merchandise at any exchange or board of trade shall pay a mercantile license tax of twenty-five cents on each thousand dollars' worth, gross, of goods so sold."

1. The first and most strenuous objection made is that the act violates § 1 of article 9 of the Constitution, requiring that "all taxes shall be uniform upon the same class of subjects, within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws," and that it does so because, being a tax upon property, it taxes property at different rates as against retailers and against wholesalers, and again as against those dealing through an exchange or board of trade. The objection is thus clearly summed up with great compactness in the argument of the distinguished counsel for appellant in the first case: "The distinction here made, which is legislatively regarded as the justification for this arbitrary taxation, is not the amount of the property of merchandise venders, not a difference in the amount of the property vended, not a difference in the manner of vending it, not a difference in the persons vending it, but solely a difference in the persons to whom that vending is done." And it is added that the provision in reference to dealers at an exchange is open to the further objection that it is based "exclusively and arbitrarily upon the place where the sales are made, irrespective of those who participate in them, either as venders or as vendees." The foundation on which this argument rests, it will be perceived, is that the tax is laid specifically upon property. Conceding for present purposes that this is its

true character, does the consequence necessarily follow that it is so wanting in uniformity as to transgress the constitutional restrictions? Assuming it to be intended as a tax on property, the basis of distinction in the legislative intent, clearly, was property kept for sale by regular dealers in the course of their business, and the tax was graduated and classified by the amount and method of the sales. The purpose for which property is kept or used has long been a recognized, and to some extent a favorite, basis for distinction in taxation. Thus, household and kitchen furniture in private use have been exempted, while the same articles as stock in trade have been taxed. Carriages kept for pleasure and watches for private use have been taxed as such, while carriages in livery stables and watches in a jeweler's stock have been exempted or taxed in a different manner or at a different rate. Other examples might be given, and the very tax in controversy here, upon dealers, distinguished into retailers and wholesalers, has, in one form or another closely analogous, been on the statute books so long that it is one of the most familiar in the history of our taxation. This subject will be further considered later on, but enough has been said here, we think, to show that, even as a tax on property, it is not unconstitutional for want of uniformity. But another and even clearer ground upon which this act can be sustained is that the tax imposed is not specifically on property, but on the business of selling.

The argument that the tax is upon property is based on two cases in this court: *Allentown* v. *Gross*, 132 Pa. 319, 19 Atl. 269, and *Williamsport* v. *Wenner*, 172 Pa. 173, 33 Atl. 544,—and not upon the decisions themselves, but upon language supposed to indicate the *ratio decidendi*. Both were *per curiam* opinions, in which the grounds of decision were not discussed further than by approval of the judgments of the court below. It is necessary, therefore, to examine just what such approval involves. In *Allentown* v. *Gross*, an ordinance had been passed imposing a tax upon all dealers, graduated according to the amount of their gross annual sales, and another ordinance providing for the issue of licenses, *inter alia*, to hotel and restaurant keepers. The report of the case does not give the latter ordinance, further than the statement that the license was to be "at certain specified rates," presumably based, as under the prior ordinance, on the gross annual sales. The defendant (appellant) was assessed as a restaurant keeper in class 8. His contention, as stated by the learned judge below, was "that the grading of the license tax according to the amount of the gross sales is illegal, because it is not uniform; that all liquor sellers should be required to pay the same amount; and that, by making the amount of sales a basis, it is in effect an income tax. But this is not a taxing of the person of the liquor seller, but of his property, estimated by the volume of the annual sales." This last sentence is the expression on which appellant bases his argument that the tax now in controversy is a tax upon property. But it is apparent that the learned judge there had in his mind no such distinction as that between the tax on property as such, and property as an incident of business measurable by the amount of sales. It had been held in *Banger's Appeal*, 109 Pa. 79, cited by the judge in connection with the language above quoted, that a tax on occupations, graduated according to the amount earned by each individual, was an income tax not authorized by law. This was what the judge referred to, and the distinction in his mind was that between a tax on the person of the licensee, as an occupation or income tax, and a tax directly or indirectly upon property. The language must be read in connection with the facts to which it was applied, and so read it has no bearing on the present question. The decision, however, is exactly in point in favor of the present judgment; for what it actually decides is that a tax upon venders of merchandise, graduated according to the amount of annual sales, is not unconstitutional for want of uniformity. The other case relied on by appellant (*Williamsport* v. *Wenner*, 172 Pa. 173, 33 Atl. 544) raised a very similar question. The city, by ordinance, had imposed a license tax on all persons "doing business," and, after fixing a definite sum for each kind of a large number of specified occupations, it grouped together "merchants of all kinds . . . butchers . . . produce or merchandise venders," etc., classified them by the amount of annual sales, and graduated the tax accordingly. The court below, in sustaining the tax, used some expressions that it was a tax on property; but, as in the other case, clearly with reference only to the argument made, that it was a personal license or occupation tax, and therefore, under *Banger's Appeal*, 109 Pa. 79, not subject to variation in amount. This court affirmed the decision, as already said, in a *per curiam* opinion, and what it really decided was that the grading of the tax on dealers according to the amount of sales did not make it void for want of uniformity. This court, as thus appears, has not decided that a tax such as now before us is a tax upon property, requiring uniformity in the rate. On the contrary, though the question in its present aspect has never been directly discussed, it has in effect been twice decided in favor of the validity of the tax.

As already said, even regarding it as a tax upon property directly, it could be sustained as a classification according to the use and purposes for which the property is held. But an examination of the details of the provisions of the present act makes it clear that the tax, as held by the learned judge below, is upon the business of vending merchandise, and that the classification is based on the manner of sale, and within each class the tax is graduated according to the gross annual volume of business transacted. This is apparent from the fact that the amount of the tax over the small, fixed license fee is determined in every case by the volume of business, measured in dollars, and the

rate at which it is to be levied is according to the manner of sale. The act divides venders of merchandise into four classes,—retailers in general, wholesalers in general, retailers at an exchange or board of trade, wholesalers at an exchange or board of trade. For each of these classes a uniform rate is fixed per dollar of business transacted. Such a tax is "uniform upon the same class of subjects," within the requirements of the Constitution. It is not necessary at this late day to enter on a defense of classification. In reference to subjects of taxation it has always existed, and the power is explicitly recognized in the section of the Constitution which requires uniformity. In *Durach's Appeal*, 62 Pa. 491, it was said by Sharswood, J.,—certainly as strict a constructionist as ever sat on this bench: "In the legitimate exercise of the power of taxation, persons and things always have been, and may constitutionally be, classified. No one has ever denied this proposition." In *Com.* v. *Delaware Division Canal Co.* 123 Pa. 594, 620, 2 L. R. A. 798, 16 Atl. 584, our late brother Clark said: "The new Constitution does not withdraw the power of classification from the legislature. . . . The power to impose taxes for the support of the government, subject to the limitations of the Constitution, still belongs to the legislature. The selection of the subjects, their classification, and the methods of collection are purely legislative matters." And in *Seabolt* v. *Northumberland County Comrs.* 187 Pa. 318, 41 Atl. 22, it is said: "Classification is a legislative question, subject to judicial revision only so far as to see that it is founded on real distinctions in the subjects classified, and not on artificial or irrelevant ones used for the purpose of evading the constitutional prohibition. If the distinctions are genuine, the courts cannot declare the classification void, though they may not consider it to be on a sound basis. The test is not wisdom, but good faith in the classification." The division of venders into wholesale and retail is perhaps the most obvious and familiar that could be made. It is founded on a known or presumed difference in the percentage of profit to bulk of sales, and has been on our statute books for more than a century. It is equally clear that the subclassification of dealers at an exchange or board of trade is not based merely on location, as complained, but on the mode of sale. Such dealers are not supposed, in the ordinary course of their business, to carry an actual stock of goods in a store or defined location, with its accompaniments of rent, clerk hire, expenses of delivery, etc., but to deal largely, if not entirely, on samples, orders, bills of lading, warehouse receipts, etc., by which title passes without actual handling of the goods. If such differences in the manner of transacting the business exist, they are a legitimate basis for classification, and whether they do in fact exist is a question for legislative determination. We are unable to see that the classification in the act before us violates the constitutional requirement of uniformity.

2. The further objection is made that the tax is not to be "levied and collected under a general law," as required by § 1, art. 9. This objection is founded on those sections of the act which provide for a difference in the number and mode of appointment of the appraisers in the counties generally and in cities of the first class. In the counties they are to be appointed annually by the county commissioners, while in cities of the first class they are to be appointed by the auditor general and the city treasurer jointly, are to be five in number, to hold office for three years, and not all to be of the same political party. Certain variations in the duties of the treasurers in hearing appeals, etc., are involved in these differences in regard to appraisers. These differences, however, are all merely incidental to the purpose of the statute,—to provide revenue. All the provisions relating to the tax itself, the classes of persons subject to it, and its amount in each case, the mode of assessment and the duties of assessors in relation to it, and the right of ultimate appeal by the citizen to the court, are uniform, and prescribed by a general law applicable alike over all the state. The sole variations are in the number and mode of appointment of the appraisers. The generality of the law is not destroyed by such slight differences in its machinery of application. In *Com.* v. *Delaware Division Canal Co.* 123 Pa. 594, 2 L. R. A. 798, 16 Atl. 584, already cited, the act of 1885 had classed loans, money at interest, etc., together at a uniform rate of taxation, and it was objected (see p. 616, 123 Pa. and p. 802, 2 L. R. A. and p. 586, 16 Atl.) that all other subjects are valued and taxed by the local assessors, while corporate loans, without being valued, are directed to be assessed by the treasurer of the corporation which issued them. But this court held that "a mere diversity in the methods of assessment and collection violates no rule of constitutional right, if when they are applied there is substantial uniformity in the result." There are counties of large population and business where the work of assessment is necessarily greater in amount and importance than in the average counties of the commonwealth. The legislature might have recognized the necessity for a somewhat different system of assessment in such cases, and classified them accordingly. But it found a classification of cities already made, well suited to the requirements of the occasion, and adopted it *pro tanto* for the purposes of the act. It was entirely competent to do so. The basis of classification of cities is entirely germane to such use. They are divided into classes for the purpose of legislation with reference to their municipal and governmental functions, and the highest of these is taxation,—the power of taking the property of the citizen without his consent for purposes he may or may not approve. The city of Philadelphia, the only present city of the first class, has always, both before and since the Constitution of 1874, had its own special system of municipal taxation; and the state might well

adopt a special system for the assessment and collection of its own tax from the same population in the same territory without thereby destroying either the uniformity of the tax or the generality of the law.

3. It is further objected that the act violates the prohibition in § 7 of article 3 against local or special laws "regulating the affairs of counties, cities," etc., or "prescribing the powers and duties of officers in counties, cities," etc. What has already been said in the discussion of the classification by the act practically disposes of this objection. The "affairs" which are regulated are not the affairs of the city, but of the state. The rights of the citizens are not made any different in cities from those in counties. Both are assessed at the same rate in the same classes, by single assessors, from whom there is an appeal first to the assessor, with others, so that he may not sit alone in judgment on his previous action, and finally to the courts. The fact that in one case the first appeal is to the assessor and the county treasurer, and in the other to the board of five assessors, makes no substantial variation in the citizen's rights, any more than the fact that his further appeal is to a court of common pleas, with a greater number of judges. In regard to prescribing duties of officers in cities, that provision relates to the duties of such officers in their municipal capacity. There is no prohibition to the state to impose additional duties to itself on city officers *virtute officii*. The state may appoint its own agents to collect its own tax, even though such agent be also for the other purposes a municipal officer, and his duties as state agent will not necessarily blend or become part of his duties as a city officer. This was practically decided in *Philadelphia* v. *Martin*, 125 Pa. 583, 17 Atl. 507, where it was held that the compensation of the city treasurer of Philadelphia in the collection of the state license fees from venders of merchandise, etc., was due to him as a separate agent of the state, and was not required to be paid by him into the city treasury. In commenting on that case in *Schuylkill County* v. *Pepper*, 182 Pa. 13, 37 Atl. 835, our brother Dean stated the rule thus: "The state may by law appoint any county officer its agent for the transaction of its business, and as such state officer or agent he may be entitled to fees for such services; but for the performance of any and every duty as a county officer the fees must be paid into the county treasury." And I cannot close this branch of the subject better than by a quotation from an opinion of an eminent jurist, whose decisions on constitutional questions during his long and honorable career on the bench derived additional weight from his previous distinguished service in the halls of Congress during the most critical period in the history of the nation. In *Bartley* v. *Fetton*, 10 Phila. 496, on this exact point then arising under the similar act of 1887, Thayer, P. J., said: "The particular provision objected to relates to the subject of taxation, the appointment of mercantile appraisers, and the publication of the lists and classification prepared by them. The act enacts that the appraisers shall be appointed by the county commissioners, except in cities of the first class, in which they are to be appointed by the auditor general and the city treasurer. In cities of the first class five such appraisers are to be appointed, whereas in the other counties of the state only one is appointed for each county. . . . The truth is that, this being a law relating to state taxation, it was perfectly competent for the legislature to provide for the appointment of one set of agents to attend to the levying and collection of this tax in one part of the state, and another set of agents to attend to it in another part. Indeed, it appears to me that it would have been entirely competent for the legislature to do this by an enactment in direct terms, without resorting to the expedient of putting the provision which is objected to in the form of an enactment for cities of the first class; for the object of the law is not to prescribe the powers and duties of city, borough, and county officers, but simply to designate what persons shall act as the agents of the state in the collection of the tax, and the fact that some of the agents selected are state officers, some county officers, and some city officers, affords no pretext to say that the Constitution is violated by any infraction of the provision already quoted. There is no such infraction. The legislature could appoint whatever agents it chose for this purpose, and the state would be in a sorry plight if they could not."

4. Another objection made is that the 10th section of the act, providing that the rate of commissions, mileage, etc., shall remain the same as now fixed by existing law, offends against § 6 of article 3 of the Constitution, which requires that all laws revived, amended, or the provisions thereof extended or conferred, shall be re-enacted at length. Section 10 was plainly put in merely *ex majore cautela* and has no practical effect. It must be read as if it said: "This act shall not be held to repeal by implication any existing law relating to commissions, fees, or mileage." No act can be rendered unconstitutional by a section which makes no change whatever in the law as it was before, and which might have been omitted without any effect whatever.

5. The last objection, evidently thrown in as a makeweight, is that the provisions of the act are an invasion of the individual liberty of the citizen, contravening the bill of rights of our own Constitution, and the 4th, 5th, and 14th Amendments to the Constitution of the United States. When these irrelevant and overworked generalities are thus called in, it may be safely assumed that the advocate has little confidence in his more definite and substantial arguments. The learned judge below said that "this objection seems to be somewhat belated," and he might truly have said that it was not only belated, but exceedingly flimsy. All taxes and methods of collecting them are interferences with the natural man and his individual rights, but he must give up something of

them when he comes into society under an *orderly government. Universal experience* has shown that the average citizen does not come forward voluntarily and make frank disclosure of his taxable property, and the state must be conceded authority and adequate means of discovering it *in invitum*. In *Bell's Gap R. Co.* v. *Pennsylvania*, 134 U. S. 232, 33 L. ed. 892, 10 Sup. Ct. Rep. 533, it was said by Mr. Justice Bradley: "The provision in the 15th Amendment that no state shall deny to any person within its jurisdiction the equal protection of the laws was not intended to prevent a state from adjusting its system of taxation in all proper and reasonable ways. It may, if it chooses, exempt certain classes of property from any taxation at all, . . . may impose different specific taxes upon different trades and professions, and may vary the rates of excise upon various products. . . . All such regulations, and those of like character, so long as they proceed within reasonable limits and general usage, are within the discretion of the state legislature, or the people of the state in framing their Constitution. But clear and hostile discriminations against particular persons and classes, especially such as are of an unusual character, unknown to the practice of our governments, *might be obnoxious to the constitutional* prohibition. It would, however, be impracticeable and unwise to attempt to lay down any general rule or definition on the subject that would include all cases. They must be decided as they arise. We think that we are safe in saying that the 14th Amendment was not intended to compel the state to adopt an iron rule of equal taxation. If that were its proper construction, it would not only supersede all those constitutional provisions and laws of some of the states whose object is to secure equality of taxation, and which are usually accompanied with qualifications deemed material, but it would render nugatory those discriminations which the best interests of society require, which are necessary for the encouragement of needed and useful industries and the discouragement of intemperance and vice, and which every state, in one form or another, deems it expedient to adopt." After this explicit decision by the supreme authority on the subject, even the enthusiastic ingenuity of counsel might have considered the question as settled.

Judgments affirmed.

IOWA SUPREME COURT.

John Y. FERRY *et al.*
v.
S. C. CAMPBELL, Exr., etc., of Frank C. Stewart, Deceased, *et al.*, *Appts.*

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

1. **A collateral-inheritance tax** for the use of the state, imposed by Acts 26th Gen. Assem. chap. 28, without any provision for notice to the heirs, legatees, or devisees, is unconstitutional as a deprivation of property without due process of law.
2. **A retroactive amendment curing a defect in a collateral-inheritance-tax law** by making necessary provision for notice of the proceedings for ascertaining the amount of the tax, is valid and operative as to the estate of a person who died before the amendment,—at least so far as it applies to such personal property as may not yet be distributed.
3. **A judgment which was correct when rendered,** holding that a collateral-inheritance-tax law was unconstitutional for lack of any provision for notice of the proceedings *to ascertain the amount of the tax*, may be reversed on account of an amendment enacted pending the appeal, by which the defect in the law is cured.

(January 22, 1900.)

APPEAL by defendants from a judgment of the District Court for Pottawattamie County in favor of plaintiffs in an action brought to enjoin the enforcement of an inheritance tax upon the estate of Frank C. Stewart, deceased. *Reversed.*

Statement by **Deemer, J.**:

Suit in equity to enjoin defendants from collecting an inheritance tax upon the property of the estate of Frank C. Stewart on the ground that chapter 28 of the Acts of the 26th general assembly, and the re-enactment thereof in the Code of 1897, are in contravention of the 14th Amendment to the Constitution of the United States, and of § 9, art. 1, of the Constitution of this state. Defendants demurred to the petition, but their demurrer was overruled, and decree was entered for plaintiffs as prayed. Defendants appeal.

Messrs. **Milton Remley,** Attorney General, and **C. G. Saunders,** for appellants:

No one has a natural or constitutional right to the property of a decedent. The right of inheritance is a statutory right only.

The state has an absolute power to dispose of the property left by one deceased. It may claim it all for the state, or any part there-

NOTE.—As to constitutionality of inheritance tax, see State *ex rel.* Davidson v. Gorman (Minn.) 2 L. R. A. 701; *Re* Howe (N. Y.) 2 L. R. A. 825, and *note;* Wallace v. Myers (C. C. S. D. N. Y.) 4 L. R. A. 171, and *note;* State v. Hamlin (Me.) 25 L. R. A. 632; Minot v. Winthrop (Mass.) 26 L. R. A. 259; State v. Alston (Tenn.) 28 L. R. A. 178; State *ex rel.* Schwartz v. Ferris (Ohio) 30 L. R. A. 218; State *ex rel.* Gelsthorpe v. Furnell (Mont.) 39 L. R. A. 170; State *ex rel.* Garth v. Switzler (Mo.) 40 L. R. A. 280; Kochersperger v. Drake (Ill.) 41 L. R. A. 446; *Re* Cope (Pa.) 45 L. R. A. 316; and Drew v. Tifft (Minn.) 47 L. R. A. 525.

of, or it may by law determine to what persons or class of persons the property shall pass or belong.

If the right of succession or inheritance is by law given to certain individuals, the state may attach conditions to the right as it deems best, or give the right to inherit only a part to the individual, the state retaining a part for itself.

United States v. *Perkins*, 163 U. S. 625, 41 L. ed. 287, 16 Sup. Ct. Rep. 1073; *United States* v. *Fox*, 94 U. S. 315, 24 L. ed. 192; *Mager* v. *Grima*, 8 How. 493, 12 L. ed. 1170; *Strode* v. *Com.* 52 Pa. 181; Dos Passos, Collateral Inheritance Tax Law, 2d ed. § 27.

The inheritance tax is an excise or tax upon the succession, and is not a personal charge against the heir or against his property.

Mager v. *Grima*, 8 How. 490, 12 L. ed. 1168; *Re McPherson*, 104 N. Y. 306, 58 Am. Rep. 502; *Re Swift*, 137 N. Y. 77, 18 L. R. A. 709, 32 N. E. 1096; *Re Knoedler*, 140 N. Y. 377, 35 N. E. 601; *Wallace* v. *Myers*, 38 Fed. Rep. 184, 4 L. R. A. 171; *State* v. *Dalrymple*, 70 Md. 294, 3 L. R. A. 372, 17 Atl. 82; *Tyson* v. *State*, 28 Md. 577; *Eyre* v. *Jacob*, 14 Gratt. 422, 73 Am. Dec. 367; *Pullen* v. *Wake County Comrs.* 66 N. C. 361; *Minot* v. *Winthrop*, 162 Mass. 112, 26 L. R. A. 259, 38 N. E. 512; *Strode* v. *Com.* 52 Pa. 181; *United States* v. *Perkins*, 163 U. S. 625, 41 L. ed. 287, 16 Sup. Ct. Rep. 1073.

These plaintiffs stand in this court, not as owners, not as persons whose toil has acquired this property, but rather as persons who are permitted to take what the state has chosen to relinquish to them. Who shall dictate the terms,—the one that relinquishes, or the one that receives?

Maggon v. *Illinois Trust & Sav. Bank*, 170 U. S. 283, 42 L. ed. 1037, 18 Sup. Ct. Rep. 594.

The heir, through the notice given by the executor, has at least constructive notice that the appraisement will be filed. He may appear and resist if he so desires.

The right of succession does not attach until the condition has been complied with. One accepting the property takes it with the burden, or upon the terms, which the law imposes.

The amendment to the statute is retroactive: the law may be made to apply to estates not distributed.

Carpenter v. *Pennsylvania*, 17 How. 456, 15 L. ed. 127; Cooley, Taxn. 2d ed. 376; *Ennis* v. *Smith*, 14 How. 400, 14 L. ed. 472; *Re Ewin*, 1 Cromp. & J. 151; *Lawrence* v. *Kitteridge*, 21 Conn. 577, 56 Am. Dec. 385.

This curative act requires that the court, in any event, modify the decree so that the treasurer of the state and the executor may proceed under the act as amended by the 27th general assembly.

Clinton v. *Walliker*, 98 Iowa, 655, 68 N. W. 431; *Tuttle* v. *Polk*, 84 Iowa, 12, 50 N. W. 38; *Richman* v. *Muscatine County Supers.* 77 Iowa, 513, 4 L. R. A. 445, 42 N. W. 422; *Huff* v. *Cook*, 44 Iowa, 639; *Iowa Sav. & L. Asso.* v. *Heidt*, 107 Iowa, 297, 43 L. R. A. 689, 77 N. W. 1050.

50 L. R. A.

While one is to be protected in his interests by the law of the land, he has a right to the judgment of his peers only in those cases in which it has immemorially existed, or in which it has been expressly given by law.

Cooley, Taxn. 2d ed. 48; Cooley, Const. Lim. 610, note 3; *San Mateo County* v. *Southern P. R. Co.* 8 Sawy. 238, 13 Fed. Rep. 722; Hare, Am. Const. Law, 871.

Where the statute fixes a time when complaints may be heard in regard to the assessment, such statute is a sufficient notice.

Hagar v. *Reclamation Dist. No. 108*, 111 U. S. 701, 28 L. ed. 569, 4 Sup. Ct. Rep. 663; *McMillen* v. *Anderson*, 95 U. S. 37, 24 L. ed. 335.

The time for the meeting of a board of review at which complaints of erroneous or unjust assessments may be heard, being fixed by law, no further notice is required.

Gatch v. *Des Moines*, 63 Iowa, 718, 18 N. W. 310.

Messrs. **Frank Shinn** and **Stone & Tinley**, for appellees:

In statutes which take the property of the individual for public purposes there must be machinery provided, giving him an opportunity to be heard upon the question, and notice of the time and place when and where such opportunity will be presented.

Stuart v. *Palmer*, 74 N. Y. 188, 30 Am. Rep. 289; 1 Hare, Am. Const. Law, 314–316.

The laws of Iowa, by a uniform course, have always provided for this opportunity to be heard.

Gatch v. *Des Moines*, 63 Iowa, 718, 18 N. W. 310.

Many cases involving the doctrine of an opportunity to be heard, and notice thereof, have been decided by the Supreme Court of the United States, in every one of which this constitutional right was recognized.

Davidson v. *New Orleans*, 96 U. S. 97, 24 L. ed. 616; *Wurts* v. *Hoagland*, 114 U. S. 606, 29 L. ed. 229, 5 Sup. Ct. Rep. 1086; *Kentucky R. Tax Cases*, 115 U. S. 321, *sub nom. Cincinnati, N. O. & T. P. R. Co.* v. *Kentucky*, 29 L. ed. 414, 6 Sup. Ct. Rep. 57; *Hagar* v. *Reclamation Dist. No. 108*, 111 U. S. 701, 28 L. ed. 569, 4 Sup. Ct. Rep. 663; *Paulsen* v. *Portland*, 149 U. S. 30, 37 L. ed. 637, 13 Sup. Ct. Rep. 750; *Pittsburgh, C. C. & St. L. R. Co.* v. *Backus*, 154 U. S. 421, 38 L. ed. 1031, 14 Sup. Ct. Rep. 1114; *Walston* v. *Nevin*, 128 U. S. 578, 32 L. ed. 544, 9 Sup. Ct. Rep. 192; *Bell's Gap R. Co.* v. *Pennsylvania*, 134 U. S. 232, 33 L. ed. 892, 10 Sup. Ct. Rep. 533; *First Nat. Bank* v. *Kentucky*, 9 Wall. 353, 19 L. ed. 701.

The power to open or vacate judgments is essentially judicial. Therefore, on the great constitutional principle of separation of powers and functions of the three departments of government it cannot be exercised by the legislature.

An act declaring what judgments shall in the future be subject to be vacated would be unconstitutional and void on two grounds: First, because it would unlawfully impair the fixed and vested rights of the successful litigant; second, because it would be an un-

warranted invasion of the province of the judicial department.

1 Black, Judgm. ed. 1891, § 298.

The legislative action cannot be made to retroact upon past controversies, and to reverse decisions which the courts, in the exercise of their undoubted authority, have made.

Cooley, Const. Lim. 5th ed. p. 113, and cases cited. 2 Hare, Am. Const. Law, ed. 1889, 847; *People ex rel. Butler* v. *Saginaw County Supers.* 26 Mich. 21; *Hart* v. *Henderson*, 17 Mich. 218; *Ratcliffe* v. *Anderson*, 31 Gratt. 105, 31 Am. Rep. 716; *Re Handley*, 15 Utah, 212, 49 Pac. 829.

When litigation has proceeded to a judgment which determines the controversy on the merits it is beyond the power of legislation to alter or control.

Martin v. *South Salem Land Co.* 94 Va. 28, 26 S. E. 591; *Skinner* v. *Holt*, 9 S. D. 427, 69 N. W. 595.

The statute of 1896 was wholly void from the date of its enactment, and has ever since continued to be. It could not be revived by an allusion to it in an alleged amendatory act passed by a later general assembly.

An amendatory act, to be valid as such, must relate to an existing statute, and not to one which is nonexistent, or has been repealed or declared unconstitutional.

23 Am. & Eng. Enc. Law, p. 277.

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

The 1st section of the act in question reads as follows: "All property within the jurisdiction of this state, and any interest therein, whether belonging to the inhabitants of this state or not, and whether tangible or intangible, which shall pass by will or by the statutes of inheritance of this or any other state, or by deed, grant, sale or gift, made or intended to take effect in possession or in enjoyment after the death of the grantor or donor, to any person in trust or otherwise, other than to or for the use of the father, mother, husband, wife, lineal descendant, adopted child, the lineal descendant of an adopted child of a decedent, or to or for charitable, educational, or religious societies or institutions within this state, shall be subject to a tax of five per centum of its value, above the sum of one thousand dollars, after the payment of all debts, for the use of the state; and all administrators, executors, and trustees, and any such grantee under a conveyance, and any such donee under a gift, made during the grantor's or donor's life, shall be respectively liable for all such taxes to be paid by them, respectively, except as herein otherwise provided, with lawful interest, as hereinafter set forth, until the same shall have been paid. The tax aforesaid shall be and remain a lien on such estate from the death of the decedent until paid." Acts 26th Gen. Assem. chap. 28. This is followed by provisions requiring the executor to make and file a separate inventory of the real estate subject to the tax, an appraisement of said real estate by appraisers approved by the clerk, the filing of the appraisement, and the manner of estimating the tax to be paid on the property. Section 3 of that act provides, in substance, that the real estate of the deceased subject to the tax shall be appraised within thirty days next after the appointment of the executor, and that the tax thereon, calculated on the appraised value, shall be paid within fifteen months after the approval of the appraisement. The appraisement made of the personal property by the regularly appointed appraisers seems to be made the basis for levy of the tax on that kind of property. No notice to the heirs, legatees, or devisees is provided for or required. For this reason it is said that the act is unconstitutional, because it results in a deprivation of property without due process of law. What is due process of law within the meaning of Federal and state Constitutions is not clearly defined. As said by Justice Miller in *Davidson* v. *New Orleans*, 96 U. S. 97, 24 L. ed. 616: "If, therefore, it were possible to define what it is for a state to deprive a person of life, liberty, or property without due process of law in terms which would cover every exercise of power thus forbidden to the state, and exclude those which are not, no more useful construction could be furnished by this or any other court to any part of the fundamental law. But, apart from the imminent risk of a failure to give any definition which would be at once perspicuous, comprehensive, and satisfactory, there is wisdom, we think, in the ascertaining of the intent and application of such an important phrase in the Federal Constitution by the gradual process of judicial inclusion and exclusion, as the cases presented for decision shall require, with the reasoning on which such decisions may be founded." Mr. Webster's definition in the *Dartmouth College Case* [4 Wheat. 518, 4 L. ed. 629], has been more generally followed than any other. Among other things, he said: "It was a law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial. The meaning is that every citizen shall hold his life, liberty, property, and immunities under the protection of the general rules which govern society. Everything which may pass under the form of an enactment is not, therefore, to be considered the law of the land." As a general rule, confiscation of property without a judicial hearing after due notice is not due process of law. There are, of course, exceptions,—as, for instance, where it becomes necessary to destroy private property to prevent the spread of fire or pestilence in a city, or the advance of an army,—but these exceptions are due to overruling necessity. In *Gatch* v. *Des Moines*, 63 Iowa, 718, 18 N. W. 310, these questions were very fully considered, and it was there held that the legislature could no more impose an assessment for which property may be taken and sold than it can render a judgment against a person without hearing; that notice of proceedings in such cases, and an opportunity for a hearing of some description were matters of constitutional right, and that a special assessment for the cost of improving streets could not lawfully

be imposed upon abutting property without notice to the owner, and an opportunity to be heard in opposition thereto. In that case certain exceptions were noted as follows: "It is true that there are some species of taxes to which the rule is not applicable. They embrace a poll tax, license tax, a tax upon occupations, and the like, where the tax is specific, and operates upon all alike. Taxes of these and like kinds are plainly exceptions to the rule, because a hearing would be of no possible avail. In such cases the law fixes the amount, and there is nothing left to inquire into and determine." The attorney general frankly concedes that, if the tax in question is a property tax, the demurrer was properly sustained, because of the fact that neither the statute nor the rules of court at that time provided for notice. But he insists that the tax is upon the right of succession; is a succession tax; in fact, that the state has the right to impose such taxes as a condition upon the privilege of inheritance, and that no notice of the appraisement is required. Such taxes as are imposed by the act under consideration have been almost universally denominated succession taxes, and they have been upheld on the theory that the right to succeed to property upon the death of the owner is the creation of law, and that the state, which creates this right, may regulate it; that is, it may say how and to what extent the succession may go, may impose conditions and burdens thereon, and may, to a certain extent, fix the situs of property for the purpose of taxation. See *Clymer* v. *Com.* 52 Pa. 187; *Strode* v. *Com.* 52 Pa. 181; *Re Swift*, 137 N. Y. 77, 18 L. R. A. 709, 32 N. E. 1096; *Miller* v. *Com.* 27 Gratt. 117; *Magoun* v. *Illinois Trust & Sav. Bank*, 170 U. S. 283, 42 L. ed. 1037, 18 Sup. Ct. Rep. 594. The history of such taxes is a most interesting study, but is entirely too long to be considered in this opinion. See, as bearing on the question, *State* v. *Alston*, 94 Tenn. 674, 28 L. R. A. 178, 30 S. W. 750; Dowell, Hist. Tax'n Eng. 148; *Review of Reviews*, Feb., 1893. Wills, and therefore testaments, and rights of inheritance and succession, are, as Blackstone says, "all of them creatures of the civil or municipal law, and accordingly are in all respects regulated by them." This is fundamental doctrine, and it is no doubt true that there is nothing in our fundamental law to prevent the legislature from taking away or limiting the right of testamentary disposition or of inheritance, or imposing such condition on its exercise as it may deem best for the public good. See *United States* v. *Perkins*, 163 U. S. 625, 41 L. ed. 287, 16 Sup. Ct. Rep. 1073; *United States* v. *Fox*, 94 U. S. 315, 24 L. ed. 192; *Mager* v. *Grima*, 8 How. 490, 12 L. ed. 1168; *Eyre* v. *Jacob*, 14 Gratt. 427, 73 Am. Dec. 367.

These well-settled propositions do not, as we view it, settle the question raised by the demurrer. The statute says that "all the property within the jurisdiction of the state which shall pass by will or by the statutes of inheritance of this or any other state . . . shall be subject to a tax of five per centum of its value . . . for the use of the state, . . . and all administrators, executors," etc., shall be liable for all such taxes to be paid by them, . . . and the tax aforesaid shall be and remain a lien on such estate from the death of the decedent until paid." Section 3 of the act provides that all real estate subject to the tax shall be appraised within thirty days after the appointment of the executor, and the tax calculated thereon upon the appraised value shall be paid by the person entitled to said estate, and in default thereof the court shall order the same, or so much thereof as may be necessary to pay the tax, to be sold. It will thus be seen that the right of testamentary disposition or of inheritance as it had theretofore existed is recognized by this statute. The property passes to the heir, devisee, or legatee just as it did prior to the enactment of this law; but a lien is imposed upon it under certain conditions, in virtue of the right of the state to tax successions, and the amount of the lien or tax is to be determined by an appraisement of the property. If the statute provided that thereafter certain persons should not be permitted to take by will under the statute, except on condition that they pay a tax fixed by an appraisement of the property, there would be more reason for saying that such a tax, being strictly upon the right of succession, and not upon property in which the heir or legatee had an interest, might be levied and collected without notice to the parties in interest. But such is not the case. The property, whether disposed of by will or descending under the statutes of the state, became the property of the devisee, legatee, or heir immediately upon the death of the testator or ancestor; and the measure of liability for the tax is fixed by an appraisement of the property, made after the testator's death. Sustaining the proposition that an heir has a vested interest in the property of his ancestor upon the death of such ancestor, see *Weaver* v. *State* (filed at the present term) 81 N. W. 603, and *Moore* v. *Gordon*, 24 Iowa, 158. The collateral-inheritance tax statute imposes a burden upon this interest which is fixed and determined by an appraisement of the property, and no provision for notice to the heir or devisee, or for opportunity to be heard, is made. Call this tax what you will, it is evident that it deprives or may deprive a citizen of his property without notice and opportunity to be heard. Doubtless it is not a property tax in the strict sense of that term, but the amount is not fixed and certain, as it is where a specific license or occupation tax is imposed. In such cases, as said in the *Gatch Case*, there is nothing left to inquire into and determine. Special assessments for improvements are not, strictly speaking, taxes, but it is held that notice of proceedings in such cases, and opportunity for a hearing of some description, are matters of constitutional right. As said by Judge Cooley in his work on Taxation, at pages 255, 256: "It is not to be presumed that constitutional provisions carefully framed for the protection of property were intended or could be construed to sanction legislation under which officers might strictly

assess one for any amount in their discretion without giving an opportunity to contest the justice of the assessment. When the assessment is based upon value or benefit, whether it be a tax on property or succession tax, and that value is to be ascertained by appraisement, assessors, or other tribunal which involves inquiry, notice and an opportunity for hearing are essential to the validity of the proceedings." *Hagar* v. *Reclamation Dist. No. 108*, 111 U. S. 701, 28 L. ed. 569, 4 Sup. Ct. Rep. 663, 28 L. ed. 569; *Stuart* v. *Palmer*, 74 N. Y. 183, 30 Am. Rep. 289. The succession tax of the state of New York provides for notice to parties interested, and in *Re McPherson*, 104 N. Y. 321, 58 Am. Rep. 502, 10 N. E. 685, the Supreme Court of that state said: "This tax is imposed according to the value of the legacy and collateral inheritance liable to be taxed, and hence there must be some method of ascertaining that value; and for that purpose judicial action is requisite at some stage of the proceeding before the liability of the taxpayer becomes finally fixed. He must have some kind of notice of the proceedings against him, and a *hearing, or an opportunity to be heard, in* reference to the value of his property and the amount of the tax which is thus to be imposed. Unless he has these, his constitutional right to due process of law has been invaded."—citing cases heretofore referred to.

The attorney general contends, however, that the tax is simply a claim against the estate, and that no notice of the filing or hearing of such claims is required to be given to the heirs or legatees. The difficulty with this proposition is that the claim is not against the estate; surely not against the estate alone. Indeed, it may never pass through the hands of an administrator, for, as a rule, the administrator has nothing to do with the real estate. A large part of the Stewart estate was real estate situated in Pottawattamie county. The tax was made a lien on this real estate, and under the provisions of the act in question the devisee was authorized to pay the tax directly to the state treasurer, and the treasurer was authorized to collect the same by suit. Again, it is said that by the provisions of § 15 of the act the district court has jurisdiction to hear and determine all questions relating to said tax that may arise affecting any devise, legacy, or inheritance, subject to appeal, as in other cases, etc., and that this affords such hearing as avoids the constitutional objection. We do not think this is true. The proceedings referred to in this section are such as may arise upon appearance of the parties. The tax is fixed by the appraisement, of which no notice is required; and the section itself does not contemplate notice. It merely gives the court jurisdiction to hear certain contests that may arise relating to the tax, and affecting any devise, legacy, or inheritance. Without this provision it is no doubt true that the district court would have jurisdiction to determine any question relating to the tax that was properly brought before it, and the statute simply gives that court, acting as a court of probate, jurisdiction of the matter. It in no manner cures the constitutional objection. We are abindingly convinced that the acts of the 26th general assembly are, for the reason stated, contrary to the provisions of both the Federal and state Constitutions.

2. The 27th general assembly passed an act known as 'chapter 37, Amendatory Act,' providing for notice to all parties interested of the appraisement of the property. It is argued by the attorney general that this cured the defect in the law, and that, as the case is triable *de novo* in this court, we have power to modify the decree entered by the district court, and hold the property subject to the tax. By § 2 of that act the law was made retroactive, and it is claimed that the decree should be reversed in view of this subsequent legislation. A succession tax may be imposed on property not yet distributed. *Carpenter* v. *Pennsylvania*, 17 How. 456, 15 L. ed. 127; Cooley, Taxn. 2d ed. 376. And, if the original act was cured by the amendatory act, we see no reason why it should not be made to apply to estates undistributed at the time the amendatory act went into effect. The original act imposed a tax *upon the property of the testator, and* declared that it should be a lien on the estate from the death of the decedent until paid. The rate per cent is also fixed; and appraisement was necessary simply to fix the value of the property in order that the tax might be computed. There is no valid objection to the levy of such a tax; that is to say, it is not an illegal or unauthorized tax. It is invalid simply because the legislature did not provide for notice of the proceedings by which the amount of the tax was to be ascertained. That the legislature may cure such defects is fundamental. See *Iowa R. Land Co.* v. *Soper*, 39 Iowa, 112; *Iowa Sav. & L. Asso.* v. *Heidt*, 107 Iowa, 297, 43 L. R. A. 689, 77 N. W. 1050; *Huff* v. *Cook*, 44 Iowa, 639; *Richman* v. *Muscatine County Supers.* 77 Iowa, 513, 4 L. R. A. 445, 42 N. W. 422; *Tuttle* v. *Polk*, 84 Iowa, 12, 50 N. W. 38; *Clinton* v. *Walliker*, 98 Iowa, 655, 68 N. W. 431. Appellees' counsel say, however, that the estate vested on the death of the testator, and that any charge made thereon by the legislature after his death is unconstitutional and void. As to real estate this is true, perhaps, although it is best that we do not decide the point on the arguments before us. As to the personal estate the rule seems to be different, however. While the distributive share is a vested interest,—that is, vests in point of right at the time of the death of the intestate,—yet the persons who take and the amount to be received must be ascertained and determined by the probate court. So long as the estate remains unsettled, the legislature may cure any defects in the law creating a lien thereon, and the act may be made retroactive. The cases heretofore cited so firmly settle this principle that we need do no more than refer to them. A re-enactment of the whole statute was unnecessary. The amendatory act simply removed an impediment to the enforcement of the tax, and, when that impediment was removed, the original act was effectual, and capable of en-

forcement by proceedings had under the new act. *Blair* v. *Ostrander* (Iowa) 80 N. W. 330.

Again, it is said that a judgment is a contract, and that the obligation thereof can no more be disturbed by subsequent legislation than the obligations of a mutual agreement. A judgment is not of itself a contract in a constitutional sense. If it be based on contract, the obligation thereof cannot be impaired by subsequent legislation, but if upon tort or other cause of action not entitled to protection as a contract, then the judgment may be imposed without violating the constitutional inhibition. *Sprott* v. *Reid*, 3 G. Greene, 489; *Garrison* v. *New York*, 21 Wall. 196, 22 L. ed. 612; *Freeland* v. *Williams*, 131 U. S. 405, 33 L. ed. 193, 9 Sup. Ct. Rep. 763; *Louisiana ex rel. Folsom* v. *New Orleans*, 109 U. S. 285, 27 L. ed. 936, 3 Sup. Ct. Rep. 211.

Moreover, while the judgment in this case was conclusive and binding between the parties from the time it was rendered, if not superseded as provided by law, yet, in view of the appeal, it was subject to modification or reversal so long as this court had jurisdiction of the case. Surely, this court is not estopped by any constitutional provision from rendering any judgment it may see fit on appeal, and we may, in so doing, especially in equity cases, consider the law as it exists at the time we are called upon to act. This is elementary law, sustained by some of the authorities already cited. While it is true that the original act was unconstitutional because it did not provide for notice, that defect has now been cured, and we must decide the case on appeal in the light of the law as it now exists. That the case was heard in the trial court on demurrer, and was presented to us on assignment of error, does not qualify this rule. The facts are admitted, and it is simply a question of law to be determined by this court on the agreed statement of the facts. The *Iowa Land Company Case* was tried on demurrer, and yet the decision was rendered under the law as it existed at the time the case was heard in this court. No new fact is introduced. We are constrained to hold that, in view of the subsequent legislation, the judgment of the trial court should be reversed, and the cause remanded for further proceedings in harmony with this opinion. But it should not be understood from this holding that any of the property is subject to the tax. That question must be determined from the facts as shown upon a trial on the merits. It may be that no tax can be collected from the real estate. On that point we express no opinion. And it may further appear that the personal estate was distributed, in whole or in part, at the time the amendatory act was passed, and that no tax should be imposed on the personal property. That question is left open for further consideration. The parties will each pay one half the costs of this appeal.

Reversed.

Granger, Ch. J., not sitting.

E. R. MORRIS
v.
J. E. STOUT, Sheriff, etc., *Appt.*

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

A statute making it a crime for a man to marry a woman for the purpose of escaping a prosecution for seduction, and afterwards to desert her without just cause, is not in violation of Const. art. 1, § 6, requiring all laws of a general nature to have a uniform operation, as it simply imposes a liability for the doing of specific acts, and every man so doing comes within its operation.

(April 8, 1899.)

APPEAL by defendant from a judgment of the District Court for Polk County discharging plaintiff from the custody of defendant to which he had been committed while under indictment for violation of a statute prohibiting desertion of their wives by persons who marry under compulsion. *Reversed.*

Statement by **Granger, J.**:

The plaintiff was arrested on preliminary information, and at the examination he was held for appearance to answer the action of the grand jury on a charge of violating the provisions of section 4764 of the Code. A warrant of commitment issued to the defendant sheriff, commanding him to detain the plaintiff in the jail of the county until legally discharged by due course of law. The plaintiff presented his petition to the district court, reciting facts and charging the restraint as illegal, and, in accord with the prayer, a writ of habeas corpus issued; and the defendant made return thereto, showing the facts under which plaintiff was held in custody, and presented a demurrer to the petition, which the court overruled, sustaining the writ and discharging the plaintiff. The defendant appealed.

Messrs. **Milton Remley,** Attorney General, and **James Nugent,** for appellant:

A law is not objectionable where it applies with equal force to all the persons who may fall within its operation.

Iowa R. Land Co. v. *Soper*, 39 Iowa, 112; *McAunich* v. *Mississippi & M. R. Co.* 20 Iowa, 338; Cooley, Const. Lim. pp. 480 *et seq.*

Messrs. **Bowen & Brockett,** for appellee:

The designation of persons who shall be affected by a statute must be a reasonable and natural classification.

Cooley, Const. Lim. pp. 481 *et seq.*; Sutherland, Stat. Constr. § 127, p. 162.

Is it reasonable and natural that the law-making branch of the government should select from deserting husbands those who married partly or wholly from the motive of es-

NOTE.—As to marriage to escape prosecution for seduction, see State v. Otis (Ind.) 21 L. R. A. 733; and Henneger v. Lomas (Ind.) 32 L. R. A. 848.

caping a prosecution, and denounce them as criminals, while others in precisely "the like situation" (unless the motive of the marriage makes it different) are given immunity?

The "good cause" which would justify desertion under this statute, as under our divorce law, must meet the test that the act or acts relied on amount to a ground for divorce.

Taylor v. *Taylor*, 80 Iowa, 29, 45 N. W. 307; *Pierce* v. *Pierce*, 33 Iowa, 240; *Detrick's Appeal*, 117 Pa. 452, 11 Atl. 882; *Lane* v. *Lane*, 67 Iowa, 76, 24 N. W. 601.

That the classification of persons to be subjected to given laws must be natural and reasonable, see—

Schmalz v. *Woolcy*, 56 N. J. Eq. 649, 39 Atl. 539; *State* v. *Post*, 55 N. J. L. 264, 26 Atl. 683; *State ex rel. Randolph* v. *Wood*, 49 N. J. L. 85, 7 Atl. 286; *Ex parte Jentzsch*, 112 Cal. 468, 32 L. R. A. 664, 44 Pac. 803; *Tacoma* v. *Krech*, 15 Wash. 296, 34 L. R. A. 68, 46 Pac. 255; *Harding* v. *People*, 160 Ill. 459, 32 L. R. A. 445, 43 N. E. 624; *Braceville Coal Co.* v. *People*, 147 Ill. 66, 22 L. R. A. 340, 35 N. E. 62; *Frorer* v. *People use of School Fund*, 141 Ill. 171, 16 L. R. A. 492, 31 N. E. 395; *Sutton* v. *State*, 96 Tenn. 696, 33 L. R. A. 589, 36 S. W. 697; *Stratton Claimants* v. *Morris Claimants*, 89 Tenn. 497, *sub nom. Dibrell* v. *Lanier*, 12 L. R. A. 70, 15 S. W. 87.

Mr. **L. Kinkead** also for appellee.

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

The only question presented by the appeal is the constitutionality of our law making it a crime for a man to marry a woman for the purpose of escaping a prosecution for seduction, and afterwards deserting her without just cause. Section 4762 of the Code defines the crime of seduction, and prescribes the penalty for it. The next two sections are as follows:

"Sec. 4763. If before judgment upon an indictment, the defendant marry the woman thus seduced, it is a bar to any further prosecution for the offense.

"Sec. 4764. Every man who shall marry any woman for the purpose of escaping prosecution for seduction, and shall afterwards desert her without good cause, shall be deemed guilty of a misdemeanor, and shall be punished accordingly."

The district court held § 4764 vulnerable to article 1, § 6, of the Constitution, which provides that "all laws of a general nature shall have a uniform operation." This law is, no doubt, of a general nature. The question then is, Does it fail to be of uniform operation, within the constitutional meaning? This court has said, speaking of this same constitutional provision, that "if the law operates upon every person within the relations or circumstances provided for, it is sufficient as to uniformity." It is said they are to be "uniform in their operation upon all persons in the like situation." *McAunich* v. *Mississippi & M. R. Co.* 20 Iowa, 338; *Haskel* v. *Burlington*, 30 Iowa, 232; *Iowa R. Land Co.* v. *Soper*, 39 Iowa, 112. This rule is not questioned, but the thought seems to be that the act in question embraces, not husbands generally, but a particular class of husbands, and that, hence, there is no uniformity in its operation. We do not find that a law like ours has been enacted in any of the other states, but many of them have a law, that we do not have, which makes husbands criminally liable for abandoning, for deserting, and for neglecting to provide for their wives when able so to do. Laws of such character are to be found in Connecticut, Missouri, Colorado, Pennsylvania, New York, Massachusetts, Alabama, New Jersey, and Wisconsin. It is true, those laws are general as to all husbands. We have the law provided in § 4763, that, if a man criminally charged with seduction shall marry the woman seduced, his act of marriage shall bar a further prosecution; and in the same connection, and on the same subject, the further provision that if he shall desert the woman so married, without good cause, he shall be punished criminally. That law is applicable to all men who marry to avoid prosecution. The law has, in effect, classified men who marry under such conditions. The state has waived its charge of criminality, because of an undertaking to discharge the obligations of a husband; and the waiver is conclusive, regardless of the fact of guilt. The law imposes upon the state and upon the man the obligations of good faith; and nothing need be clearer than that such a breach of the marital vows by desertion would go beyond the ordinary breach of such vows, for it robs the law, under which the prosecution was waived, of the very inducement for its enactment. The law, as a whole, simply says to the man who thus marries, "You shall not assume the obligations of a husband, to avoid prosecution for a crime, and, after taking the benefits to yourself, disregard your assumed obligation with impunity." If an ordinary desertion, without cause, could be made criminal, which no one seems to deny, why may not the same act with the added fact of having married to avoid prosecution? It is a mistake to say that the law has reference, in its operation, to one man more than to another. It fixes the facts that will constitute the crime, and any man who does the prohibited acts is guilty of the crime. One fact to appear is that there is a charge of seduction; another, that the person charged married to escape prosecution; and another, that he afterwards deserted the woman thus married, without good cause. The crime consists of the desertion, but other conditions are essential to make the law applicable, and all who come within the conditions are amenable to the law. It is said that there is no connection between the felony (the seduction) and the misdemeanor. Why need there be, to make the desertion a crime? The felony is excused. The charge of crime is excused, and the misdemeanor consists in assuming an obligation to have it excused,

and then betraying the obligation. It is also thought that there is no infringement of the public interest, in such a case of desertion, not found in any other desertion by a husband. If that be true, what does it signify? It might go to the propriety or policy of such a discrimination, but not to the validity of the law, from a constitutional point of view; for the law might include all desertions by a husband. If so, it could surely make criminal those differing from others in matters of fact. In the state of Washington an ordinance prohibited barbers from pursuing the calling on Sunday, and the act was held invalid as special legislation, it not applying to other laborers. It is said that one class is singled out, and denied rights not denied to other classes. See *Tacoma* v. *Krech*, 15 Wash. 296, 34 L. R. A. 68, 46 Pac. 255. The same holding was had in *Ex parte Jentzsch*, 112 Cal. 468, 32 L. R. A. 664, 44 Pac. 803. The holdings are that one class of persons cannot alone be denied rights which it is entitled to enjoy in common with other classes. Such a rule has no application to this case. This law involves no denial of rights. It simply imposes a liability for the doing of specific acts, and every man so doing comes within its operation. Other authorities cited by appellee are alike without application.

The demurrer to the petition should have been sustained.

Reversed.

Petition for rehearing overruled October 26, 1900.

Jane JOHNSON, *Appt.*,
v.
NEW YORK LIFE INSURANCE COMPANY.

(100 Iowa, 708.)

The conversion of a life policy into a nonforfeitable paid-up policy for a fixed term on a default in the payment of a premium, by virtue of the provisions of a new policy modifying the original contract at the request of the insured, who fails to demand, after the default, a reinstatement of the policy or a paid-up policy for a smaller sum, as he had an option to do, makes it unnecessary, in case of his death after the expiration of the stipulated term, for the insurer to give the notice required by N. Y. Laws 1877, chap. 321, § 1, as a basis for declaring a forfeiture or lapse of the policy for nonpayment of premium, since there is neither a forfeiture nor a lapse where the term expires for which the risk is taken, although substantially the same extension of the original policy would have been given him without the new contract by the New York net reserve statute (N. Y. Laws 1892, chap. 690, § 88), the operation of which would not have dispensed with the notice required for forfeiture.

(April 8, 1899.)

APPEAL by plaintiff from a judgment of the District Court for Pottawattamie County in favor of defendant in an action brought to recover the amount alleged to be due on a life insurance policy. *Affirmed.*

The facts are stated in the opinion.

Mr. **John P. Breen** for appellant.

Mr. **James H. McIntosh,** for appellee:

When Johnson died, he had no policy with the defendant.

Johnson's policy was a nonforfeitable policy. On failure to pay the premium it did not thereby become either void or voidable, forfeited or forfeitable, but stood as insurance for a specific term, which expired before Johnson died.

The clause of this accumulation policy, by which it is provided that "if the premiums are paid to November 11, 1893, the insurance of $25,000 will be extended to May 11, 1896," is certainly very clear and unambiguous. Whatever the rule may be as to the construction of doubtful terms in the policy, the contract, where its meaning is clear and unambiguous, is to be construed by the same rules of construction as apply to other instruments.

Universal L. Ins. Co. v. *Devore*, 88 Va. 778, 14 S. E. 532; *Imperial F. Ins. Co.* v. *Coös County*, 151 U. S. 452, 38 L. ed. 231, 14 Sup. Ct. Rep. 379; *Lewis* v. *United States*, 92 U. S. 618, 23 L. ed. 513; *Dwight* v. *Germania L. Ins. Co.* 103 N. Y. 341, 57 Am. Rep. 729, 8 N. E. 654; *Brady* v. *Cassidy*, 104 N. Y. 147, 10 N. E. 131; *Powers* v. *North Eastern Mut. Life Asso.* 50 Vt. 630.

When this notice law was originally passed in 1876 it had always, down to that time, been the practice of the New York courts strictly to enforce the condition in insurance policies that they should become forfeited and void if the premiums were not paid when due.

Roehner v. *Knickerbocker L. Ins. Co.* 63 N. Y. 160; *Atty. Gen.* v. *Continental L. Ins. Co.* 93 N. Y. 70.

At the time this notice law was first passed, all life insurance policies usually stipulated, first, for the payment of premiums, second, for their prompt payment on a day certain, and, third, for the forfeiture of the policy in default of punctual payment.

When Johnson's policy was converted into an accumulation policy, the two first stipulations above referred to were retained, but the third of said stipulations was annulled, and for it was substituted a provision that in case he failed to pay the premium when due his policy should be extended, and continue in force for a specific period of time.

NOTE.—As to necessity of notice before forfeiting insurance policy, see Baxter v. Brooklyn L. Ins. Co. (N. Y.) 7 L. R. A. 293; Eury v. Standard Life & Acci. Ins. Co. (Tenn.) 10 L. R. A. 534; Heinlein v. Imperial L. Ins. Co. (Mich.) 25 L. R. A. 627; Buchannan v. Supreme Conclave I. O. of H. (Pa.) 34 L. R. A. 432; Rosenplanter v. Provident Sav. Life Assur. Soc. (C. C. A. 6th C.) 46 L. R. A. 473; Mutual L. Ins. Co. v. Hill (C. C. A. 9th C.) 49 L. R. A. 127; and Mutual L. Ins. Co. v. Dingley (C. C. A. 9th C.) 49 L. R. A. 132.

The decision in Mutual L. Ins. Co. v. Hill was reversed by the Supreme Court of the United States on writ of certiorari in 178 U. S. 347, 44 L. ed. 1097.

Hence, it cannot be that the notice law of New York was intended to apply to a policy like this.

In this policy the waiver of notice contained in the policy was effectual for that purpose.

A party of full age, and acting *sui juris*, can waive a statutory, or even a constitutional, provision in his favor affecting simply his property or alienable rights, and not involving considerations of public policy.

Phyfe v. *Eimer*, 45 N. Y. 102; *Tombs* v. *Rochester & S. R. Co.* 18 Barb. 583; *People* v. *Quigg*, 59 N. Y. 83; *Re New York, L. & W. R. Co.* 98 N. Y. 447; *Farmers' & D. Ins. Co.* v. *Curry*, 13 Bush, 312, 26 Am. Rep. 194.

A contract is not void, as against public policy, unless it is injurious to the interests of the public, or contravenes some established interest of society. Public policy has been aptly described as "an unruly horse, and when once you get astride, you never know where it will carry you."

Griswold v. *Illinois C. R. Co.* 90 Iowa, 265, 24 L. R. A. 647, 57 N. W. 843.

The distinction, in respect to the question of waiver, between forfeitable policies in the usual form, and nonforfeitable policies in which, in case of nonpayment of premium, the insured was given a fair equivalent for his money paid, was recognized in *Caffery* v. *John Hancock Mut. L. Ins. Co.* 27 Fed. Rep. 25.

Desmazes v. *Mutual Ben. L. Ins. Co.* 19 Alb. L. J. 220, Fed. Cas. No. 3,821; *Farmers' & D. Ins. Co.* v. *Curry*, 13 Bush, 312, 26 Am. Rep. 194.

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

There is but little controversy between the parties as to the facts; none as to the following matters: On December 27, 1890, the defendant company issued to one Frank C. Johnson its policy of insurance on his life for the sum of $25,000. This policy was assigned to plaintiff in the year 1895, and on September 28, 1896, Johnson died. The annual premium provided for in the contract was $1,060, and it was payable in advance on the 11th day of November in each year. The policy contains the usual provisions for forfeiture in case the premiums are not paid when due. Johnson paid the premium due on November 11, 1892, and thereafter made no payments. After Johnson's death, and on the 20th day of February, 1897, plaintiff tendered to defendant the amount of the past-due premiums, with interest to that date, which it declined to accept. Thereafter this action was brought. The defendant company was duly incorporated under the laws of the state of New York, and the policy was issued in that state, and by the terms of the application the contract was to be construed by the laws thereof. It was therefore a New York contract. *Wayman* v. *Southard*, 10 Wheat. 48, 6 L. ed. 264; *Central Nat. Bank* v. *Hume*, 128 U. S. 195, 32 L. ed. 370, 9 Sup. Ct. Rep. 41.

2. Plaintiff claims that the policy in suit was not forfeited by the failure of the assured to pay the premiums which became due after November 11, 1892, and before Johnson's death, for the reason that at and prior to the time of the issuance of such policy there was in force in the state of New York a statute (Laws 1877, chap. 321, § 1), which provided: "No life insurance company doing business in the state of New York shall have power to declare forfeited or lapsed any policy hereafter issued or renewed by reason of nonpayment of any annual premium or interest or any portion thereof except as hereafter provided." We shall not set out the law in terms. It is enough to say that after default, in order to declare a forfeiture, it requires the company to mail a written or printed notice to the assured, at his last-known postoffice, stating the amount due, and the place where, and the person to whom, it is payable, and, further, that, if the amount due is not paid within thirty days after mailing the notice, "the policy and all payments thereon will become forfeited and void. In case the payments demanded by such notice shall be made within thirty days limited therefor, the same shall be taken to be in full compliance with the requirements of the policy, in respect to the payment of said premium or interest, anything therein contained to the contrary notwithstanding. But no such policy shall in any case be forfeited or lapsed until the expiration of thirty days after the mailing of such notice: Provided, however, that a notice stating when the premium will fall due, and, if not paid, the policy and all payments thereon will become forfeited and void, served in the manner herein provided, at least thirty and not more than sixty days prior to the day when the premium is payable, shall have the same effect as the service of the notice hereinbefore provided for." In *Baxter* v. *Brooklyn L. Ins. Co.* 119 N. Y. 454, 7 L. R. A. 293, 23 N. E. 1049, the court, in speaking of this statute, and its effect upon the policy of life insurance issued under it, said: "This statute was a part of the contract in question, and governed the rights and liabilities of the parties in precisely the same way and to the same extent as if all its terms and conditions had been actually incorporated into the policy." In that case the defendant was claiming a forfeiture of the policy for nonpayment of the premium when due. It was not shown that the notice required by law had been given. The court continues as follows: "There was no proof given at the trial by either party to show whether this notice [the one required by statute] was served or not. It is obvious that this statute, when imported into the contract, modified its conditions in very material respects. The duration and validity of the policy is not then dependent upon payment of the premium on the day named therein, but upon the payment within thirty days after the notice had been given. . . . The statute prescribes this notice as a necessary condition of forfeiture, and, unless it was served, the insured was not in default, because payment within thirty days after notice is to be taken as a full compliance with the conditions

as to payment of premium. . . . Before the defendant could raise any question in regard to the nonpayment of the August premium, it was necessary for it to show that it had complied with the statute by serving the notice, as this step was essential in order to put the insured in default, or to raise any point based on his omission to pay the last quarterly premium." See also *De Frece* v. *National L. Ins. Co.* 136 N. Y. 151, 32 N. E. 556; *Phelan* v. *Northwestern Mut. L. Ins. Co.* 113 N. Y. 147, 20 N. E. 827. In *Griffith* v. *New York L. Ins. Co.* 101 Cal. 627, 36 Pac. 113, the same statute is considered, and the interpretation given it by the courts of New York is adopted. We do not understand that the general principles announced in these cases are disputed by appellee. Its contention is that they have no application to the contract here involved, because the policy sued upon was, at the request of the assured, converted into a paid-up policy for a fixed term, which term expired before the assured died. Several further defenses are urged, but the conclusion we reach on the one just stated renders it unnecessary that we consider the others.

In order to present intelligibly the points made by the parties, and particularly by appellant, it may be well to say something further as to the statutes of New York on the subject of life insurance, and with relation to some other terms of the policy in suit. There was in force in that state, when this contract was made, a statute which we shall style the "net-reserve law," giving to holders of life insurance policies, which had been in force three full years, the benefit of the net reserve on their lapsed or forfeited policies, by extending the life of the policy beyond the time of the default, in this way: The reserve on such policies, "computed according to the American Experience Table of Mortality, at the rate of 4½ per cent per annum, shall on demand made, with surrender of the policy within six months after such lapse or forfeiture, be taken as a single premium of life insurance at the published rates of the corporation at the time the policy was issued, and shall be applied, as shall have been agreed in the application or policy, either to continue the insurance of the policy in force at the full amount so long as such single premium will purchase temporary insurance for the amount, at the age of the insured at the time of the lapse or forfeiture, or to purchase upon the same life at the same age paid-up insurance. . . . " Laws 1879, chap. 347, § 1; Laws 1892, chap. 690, § 88. By the terms of the statute these provisions could be waived by a proper indorsement on the policy. Such an indorsement was made on the policy in suit, in these words: "Notice. In consideration of the stipulations in case of lapse specified in the policy, the provisions of chapter 347 of the Laws of 1879 of the State of New York have been waived in the application for this policy." According to the terms of the original policy in suit, in case of lapse or forfeiture thereof after the payment of three full premiums, the assured was entitled to a paid-up policy, the amount of which was to be estimated upon a certain basis, as therein stated.

3. We now come to the change made in the contract by which, as appellee claims, it was converted into a nonforfeitable, paid-up policy for a certain fixed term. On December 10, 1892, Johnson, in writing, requested defendant to extend to his policy "the benefits of its accumulation policy." In response to this, the company issued and delivered to him a policy or certificate, the material part of which, so far as concerns the issues here, is in these words:

New York Life Insurance Company.
346 Broadway, New York.

This certifies that in compliance with the request of the legal holders of policy No. 385,048, issued on the life of Frank C. Johnson, the benefits of the accumulation policy plan of the New York Life Insurance Company are hereby extended to said policy, as stated on the next page. It is understood and agreed that, except as herein expressly modified, the terms of said policy No. 385,048 remain unchanged. . . . This policy is not subject to any conditions or restrictions as to travel, residence, occupation, or manner of death. After this policy shall have been in force three full years, in case of nonpayment of any premium subsequently due, and upon the payment within thirty days thereafter of any indebtedness to the company on account of this policy: (1) The insurance will be extended for the face amount, as provided in the table below; or (2) on demand made within six months after such nonpayment of premium dues with surrender of this policy, paid-up insurance will be issued for the reduced amount provided in said table; or (3) the policy will be reinstated within the said six months upon payment of the overdue premium, with interest at the rate of five per cent per annum, if the insured is shown to the company to be in good health, by a letter from a physician in good standing.

Table of Guaranties if Payment of Premiums is Discontinued.

Provided There is No Indebtedness against the Policy.

(Pursuant to the Insurance Law [chapter 690, Laws of 1892] of the State of New York.)

If the Premiums are Paid	(1) The Insurance of $25,000 will be Extended		or (2) The Policy may be Converted Into Paid-Up Insurance
To Nov. 11, 1879	To May 11,	1886	of $ 1,875
" " " 1880	" Jan. "	1886	" 3,035
" " " 1887	" Aug. "	1890	" 4,225
" " " 1888	" do. "	1890	" 5,250
" " " 1897	" do. "	1896	" 6,175
" " " 1898	" May "	1900	" 7,125
" " " 1899	" Feb'y "	1900	" 8,065
" " " 1900	" Aug. "	1910	" 9,000
" " " 1901	" Jan. "	1912	" 9,750
" " " 1902	" May "	1913	" 10,500
" " " 1903	" June "	1914	" 11,175
" " " 1904	" July "	1915	" 11,825
" " " 1905	" July "	1916	" 12,400
" " " 1906	" June "	1917	" 12,900
" " " 1907	" Mch. "	1918	" 13,250
" " " 1908	" Nov. "	1918	" 13,700
" " " 1909	" July "	1919	" 14,025

Policies continued in force beyond the accumulation period will be entitled, in case of nonpayment of any premium subsequently due, to extended insurance, or reduced paid-up insurance, on the same basis as that on which the above table is constructed.

What was the effect of this new contract? If it converted Johnson's policy into a contract for paid-up term insurance, then no notice was necessary. The notice is for the benefit of the assured. It would avail him nothing, when no act of his would enable him to continue the policy in force. The language of the statute is plain enough on this point. Notice is required only as a basis for declaring a forfeiture or lapse of a policy for nonpayment of premium or interest. Where the term expires for which the risk is taken, there is neither a forfeiture nor a lapse. Looking now to the language of the accumulation certificate, we find that *its provisions were to become a part of* the contract between these parties; that the clause of the original policy providing for its forfeiture for the nonpayment of premiums was so far modified and changed that upon such failure the policy became a *paid-up contract for the amount of the original* insurance, for a certain and definite term. On demand of the assured within a fixed period after default, he was given certain other options; but in default of such demand the term insurance, as stated, took effect. No such demand was made by Johnson. There was no forfeiture of Johnson's life contract, as appellee insists. By the terms of the agreement which he made, his life contract, upon his default in the payment of the premium due November 11, 1893, became transmuted into a paid-up policy for a term ending May 11, 1896. But appellant argues that the accumulation certificate gave to the original policy nothing but what was bestowed by the net-reserve statute, mentioned above, upon all policies in which its benefits are not waived, and that the notice law would apply in such cases; and it is said the benefits of the net-reserve statute were not all waived here, because of the express reservation in the contract, to which we have referred, by which the assured was entitled, upon default, to a paid-up policy. We do not think the provisions of this net-reserve statute had the effect to dispense with the notice, but there is a material distinction, which seems to have been overlooked by counsel for appellant, between the application of the law and of an accumulation certificate to a prior policy. The benefits of that statute were given only to policies which had lapsed or been forfeited for nonpayment of premium, debt, or interest; *and the notice had to be given, to effect this* forfeiture or fix such lapse. After the default, the life contract continued in force until it was determined according to the statute. In such case, if the assured died after default, but before notice, his beneficiary *would be obliged* to pay the past-due premiums, in order to recover. In the case at bar, under the modified contract, immediately on default in payment of the premium of 1893 the policy became a paid-up contract for a term; and, if the assured had died within such term, plaintiff could recover without payment of the defaulted premiums. Here the life contract did not run beyond the default day. No act of the company was necessary to put the term insurance in force. It went into effect by reason of the contract. It is true that plaintiff could have reinstated the life contract on payment of the defaulted premium within six months, and upon proof of health; but he did not do this, and therefore the term policy, which began immediately upon the default, was never altered or annulled. Adopting an illustration of the learned trial judge, if Johnson had died on May 10, 1896, plaintiff could have recovered the full face of this policy, without any further payment being required of her. But, on defendant's theory, if he had died on May 12th, one day *after the term had expired, he could still* recover, but, in order to do so, would have to tender all past-due premiums. This payment would thus be required for a single day's insurance. Counsel for appellant responds to this with a counter illustration. *He does not deny this* anomalous feature of the contract, as he claims it to be, but says that if Johnson had lived until May 12, 1896, and then tendered the amount due for premiums, he would have saved his life contract. This, he asserts, shows an inconsistency in the interpretation given by the trial court to the contract. As counsel thinks, this was holding that "the policy was good if Johnson lived, but no good if he died." Whatever right Johnson had to reinstate the life contract after his default in the payment of premiums was given him by his new policy. The life policy could have been revived in such case, not because the term insurance had not gone into effect, not because the character of the contract had not been changed in its terms, but for the reason that, by a provision of this very agreement, the old contract might, under certain circumstances, be made to supersede the new. We do not think he possessed any such right after the expiration of six months from the time of his default in the payment of the premium. The life contract did not continue alive and in force after such default. A prescribed act, within a certain time, on the part of the assured, was required, to give it vitality: and this act was never performed. *In the meantime, without affirmative action* of either party, the term insurance went into effect. Answering an argument of counsel for appellant, we will say that we do not think the accumulation certificate has any added force or virtue because it was separately issued. *The contract would have* been the same, and the rights of the parties not different, if the terms of that instrument had been incorporated in the original policy. As counsel construes the notice law, the assured cannot be deprived of the terms most favorable to him, in a policy containing a provision for alternative benefits, without notice being given him. But this

is not the law. The notice is required only when it is sought to declare the contract forfeited or lapsed. Neither was done here. We do not regard the waiver in the policy of the benefits of the net-reserve law as of any special significance, though appellee, in argument, claims something for it. Our holding would be the same if no such waiver had been made.

Our conclusion is that this was a policy for a term that expired before Johnson's death, and therefore plaintiff has no right of recovery. The other questions discussed are rendered immaterial by this finding.

Affirmed.

Rehearing denied.

KANSAS SUPREME COURT.

Walter DENNING *et al., Plffs. in Err.*,
v.
Mary A. YOUNT, Admrx., etc., of George W. Yount, Deceased.

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

*1. **That part of § 8, chap. 1, Gen. Stat. 1897,** which provides that the repeal of a statute does not affect any right accrued, duty imposed, or penalty incurred thereunder, has no application to city ordinances.

2. **Real-estate agents were denied the right to recover commissions** for the sale of land upon the ground that their business was carried on in violation of a city ordinance requiring the payment of a license tax, with the provisions of which they had failed to comply. Pending a suit to recover such commissions, the ordinance was repealed, without a saving clause. *Held,* that the repeal did not act retrospectively, nor did it have the effect of giving validity to a transaction which was unlawful at the beginning.

(July 7, 1900.)

ERROR to the Court of Appeals, Southern Department, Central Division, to review a judgment affirming a judgment of the District Court for Cowley County in favor of defendant in an action brought to enforce commissions for services in selling real estate. *Affirmed.*

The facts are stated in the opinion.

Messrs. **McDermott & Johnson** and **F. C. Johnson,** for plaintiffs in error:

The district court and the court of appeals erred in their judgment by deciding that the saving clause of the general statutes operates as a saving clause to a city ordinance.

Kan. Gen. Stat. 1897, chap. 1, § 8; 1 Beach. Pub. Corp. 526, note 4; *Naylor* v. *Galesburg*, 56 Ill. 285; *Illinois & M. Canal* v. *Chicago*, 14 Ill. 334.

Where the consideration of the contract declared void by statute is morally good, a repeal of the statute will validate the contract.

Little Rock v. *Merchants' Nat. Bank*, 98 U. S. 308, 25 L. ed. 108; Cooley, Const. Lim. p. 469; *Ewell* v. *Daggs*, 108 U. S. 143, 27 L. ed. 682, 2 Sup. Ct. Rep. 408.

The effect of a repealed statute is to obliterate the statute repealed as completely as if it had never existed, except for the purpose of those actions which were commenced, prosecuted, and concluded while it was an existing law.

Gordon v. *State ex rel. Border*, 4 Kan. 490; *Naylor* v. *Galesburg*, 56 Ill. 285; *First National Bank* v. *Henderson*, 101 Cal. 307, 35 Pac. 899; *Key* v. *Goodwin*, 4 Moore & P. 341.

The repeal of an ordinance not only blots out offenses, but also blots out forfeitures incurred by individuals.

1 Beach, Pub. Corp. 526; 17 Am. & Eng. Enc. Law, pp. 245, 246; *Kansas* v. *Clark*, 68 Mo. 588.

Where the suspension of a general law within a municipality results from a city ordinance passed in pursuance to law, the repeal of the ordinance will leave the general law in force within the city.

Heinssen v. *State*, 14 Colo. 228, 23 Pac. 995; *United States* v. *Philbrick*, 120 U. S. 52, 30 L. ed. 559, 7 Sup. Ct. Rep. 413.

A repealed law without any reservation takes away remedies given by the repealed law. All suits must stop where the repeal finds them.

South Carolina v. *Gaillard*, 101 U. S. 433, 35 L. ed. 937; *Schoepflin* v. *Calkins*, 5 Misc. 159, 25 N. Y. Supp. 696.

The repeal of the city ordinance without a saving clause deprived the defendant in error of his defense.

Butler v. *Palmer*, 1 Hill, 325; *Welch* v. *Wadsworth*, 30 Conn. 149, 79 Am. Dec. 236; *Danville* v. *Pace*, 25 Gratt. 1, 18 Am. Rep. 663; *Mechanics' & W. M. Mut. Sav. Bank & Bldg. Asso.* v. *Allen*, 28 Conn. 97; *Andrews* v. *Russell*, 7 Blackf. 474; *Parmelee* v. *Lawrence*, 48 Ill. 331; *Curtis* v. *Leavitt*, 17 Barb. 309; *Lewis* v. *McElrain*, 16 Ohio, 347; *State use of Baltimore* v. *Norwood*, 12 Md. 195; *Estep* v. *Hutchman*, 14 Serg. & R. 435; *New Orleans* v. *Clark*, 95 U. S. 644, 24 L. ed. 521; *Menard County* v. *Kincaid*, 71 Ill. 588; *Munn* v. *Illinois*, 94 U. S. 113, 24 L. ed. 77; Cooley, Const. Lim. 373, 374, 378; *Gibson* v. *Hibbard*, 13 Mich. 215; *Harris* v. *Rutledge*,

*Headnotes by SMITH, J.

NOTE.—For effect of failure to procure license for business, on validity of contracts therein, see Buckley v. Humason (Minn.) 16 L. R. A. 423, and *note;* Fairly v. Wappoo Mills (S. C.) 29 L. R. A. 215; Vermont Loan & T. Co. v. Hoffman (Idaho) 37 L. R. A. 509; Randall v. Tuell (Me.) 38 L. R. A. 143; and Smith v. Robertson (Ky.) 45 L. R. A. 510.

19 Iowa, 389, 87 Am. Dec. 441; *Johnson* v. *Bentley*, 16 Ohio, 97; *Lycoming County* v. *Union County*, 15 Pa. 166.

On petition for rehearing.

The decision is contrary to the law declared in the following actions decided by this court, which were not submitted to this court:

Gilleland v. *Schuyler*, 9 Kan. 569; *Jenness* v. *Cutler*, 12 Kan. 500; *State* v. *Boyle*, 10 Kan. 113; *State* v. *Crawford*, 11 Kan. 32; *Troy* v. *Atchison & N. R. Co.* 11 Kan. 532; *Challiss* v. *Parker*, 11 Kan. 394; *School Dist. No. 13* v. *State*, 15 Kan. 49; *Gardenhire* v. *Mitchell*, 21 Kan. 86; *Jockers* v. *Borgman*, 29 Kan. 113, 44 Am. Rep. 625; *Gordon* v. *State ex rel. Boder*, 4 Kan. 489; *State* v. *Showers*, 34 Kan. 269, 8 Pac. 474; *Mason* v. *Spencer*, 35 Kan. 512, 11 Pac. 402; *Roberts* v. *Missouri, K. & T. R. Co.* 43 Kan. 103, 22 Pac. 1006; *Gregory* v. *German Bank*, 3 Colo. 332, 25 Am. Rep. 760; *Ewell* v. *Daggs*, 108 U. S. 143, 27 L. ed. 682, 2 Sup. Ct. Rep. 408; Cooley, Const. Lim. 4th ed. 375, at note 1, p. 376; Sedgw. Stat. & Const. Law, 111; *Norris* v. *Crocker*, 13 How. 429, 14 L. ed. 210; *Gaul* v. *Brown*, 53 Me. 496; *Curtis* v. *Leavitt*, 15 N. Y. 152; *Nichols* v. *Squire*, 5 Pick. 168; *Bay City & E. S. R. Co.* v. *Austin*, 21 Mich. 391.

Messrs. **Pollock & Lafferty**, for defendant in error:

The law in this case, having been determined by this court upon its former hearing, is conclusive in this case, and is also, not only the law of this state, but is the law as laid down by the courts of last resort in other states.

Buckley v. *Humason*, 50 Minn. 195, 16 L. R. A. 423, 52 N. W. 385.

Where a contract is unlawful and void because made in violation of a positive ordinance or statute, no recovery can be had upon such contract; and the repeal of the ordinance or statute does not render the contract valid or permit a recovery to be had under such contract. It remains void.

The repeal of the ordinance could not and did not affect the case at bar.

If plaintiffs below did perform the services for which they claim commission and upon which they base their claim of recovery against the defendant, not having paid the tax and procured the license to so act, they acted in violation of this positive law, and their act in so doing was unlawful, and no recovery could be had upon the same; and such act cannot be made the basis of a valid claim.

Jones v. *Blacklidge*, 9 Kan. 562, 12 Am. Rep. 503; *Yount* v. *Denning*, 52 Kan. 629, 35 Pac. 207; 2 Benjamin, Sales, 4th Am. ed. 818; *Holt* v. *Green*, 73 Pa. 198, 13 Am. Rep. 737; *Dillon* v. *Allen*, 46 Iowa, 299, 26 Am. Rep. 145; *McConnell* v. *Kitchens*, 20 S. C. 430, 47 Am. Rep. 845; *Woods* v. *Armstrong*, 54 Ala. 150, 25 Am. Rep. 671; *Johnson* v. *Hulings*, 103 Pa. 498, 49 Am. Rep. 131; *Milne* v. *Davidson*, 5 Mart. N. S. 586, 16 Am. Dec. 189; *Johnson* v. *Simonton*, 43 Cal. 242; *Buckley* v. *Humason*, 50 Minn. 195, 16 L. R. A. 423, 52 N. W. 385.

50 L. R. A.

The act, unlawful and void when done because done in violation of positive law, is not affected by the repeal of the law.

23 Am. & Eng. Enc. Law, p. 501; Lawson, Contr. § 279; 2 Parsons, Contr. § 674; Sutherland, Stat. Constr. §§ 336, 480; Bishop, Statutory Crimes, § 1030; Endlich, Interpretation of Statutes, § 488; 5 Lawson, Rights, Rem. & Pr. § 2393; Clark, Contr. p. 507; Bishop, Contr. § 479; *Roby* v. *West*, 4 N. H. 285, 17 Am. Dec. 423; *Bailey* v. *Mogg*, 4 Denio, 60; *Woods* v. *Armstrong*, 54 Ala. 150, 25 Am. Rep. 671; *Handy* v. *St. Paul Globe Pub. Co.* 41 Minn. 188, 4 L. R. A. 466, 42 N. W. 872; *Puckett* v. *Alexander*, 102 N. C. 95, 3 L. R. A. 43, 8 S. E. 767; *Hughes* v. *Boone*, 102 N. C. 137, 9 S. E. 286; *United States* v. *Trans-Missouri Freight Asso.* 166 U. S. 290, 41 L. ed. 1007, 17 Sup. Ct. Rep. 540.

A valid city ordinance has within the city the same force and effect as statute law.

Yount v. *Denning*, 52 Kan. 629, 35 Pac. 207; *Buckley* v. *Humason*, 50 Minn. 195, 16 L. R. A. 423, 52 N. W. 385; *Johnson* v. *Simonton*, 43 Cal. 242.

The rule for the construction of city ordinances is the same as for the construction of state statutes.

17 Am. & Eng. Enc. Law, p. 264; *Re Yick Wo*, 68 Cal. 294, 58 Am. Rep. 12, 9 Pac. 139.

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

Walter Denning and Mahlon E. Johnson brought suit against George W. Yount before a justice of the peace, alleging that they were partners engaged in business as real-estate agents, and that defendant was indebted to them in the sum of $265 for commission on a sale of land negotiated by them. Defendant denied liability, and among other defenses set up an ordinance of the city of Winfield, by the provisions of which it was made unlawful for any person, firm, or company to carry on in that city the business of real-estate and loan agents or brokers without paying a semi-annual license tax of $10. It was conceded that the plaintiffs had not complied with such ordinance. They obtained judgment in that court, which was reversed here. *Yount* v. *Denning*, 52 Kan. 629, 35 Pac. 207. This court decided that the failure of Denning and Johnson to pay the license tax imposed by the municipality where they conducted the real-estate business rendered the prosecution of that calling by them unlawful, and that no recovery could be had for the commission claimed by them on the sale of said property. This decision was made at the January term, 1894, and the cause remanded to the district court for a new trial. After the case was docketed for another trial in the court below, the city ordinance above referred to was repealed, without any saving clause. Upon a second trial it was contended that such repeal gave the plaintiffs below the right to recover to the same extent as if the ordinance never existed. The trial court, however, did not take this view of the law, and plaintiffs were not permitted to recover,

which judgment was affirmed by the court of appeals, and the judgment of that court has been certified here for review. While the judgment of the district court must be affirmed, we cannot agree that the affirmance should be based upon the reasons given by the court of appeals. The syllabus of the case by that court is as follows: "(1) The repeal of a statute does not affect any right which accrued, any duty imposed, any penalty incurred, nor any proceeding commenced, under or by virtue of the statute repealed. See *State* v. *Boyle*, 10 Kan. 113; subdivision 1, § 8, chap. 1, Gen. Stat. 1897. (2) The rule for the construction of ordinances is the same as for the construction of statutes. See 17 Am. & Eng. Enc. Law, p. 264." [(Kan. App.) 59 Pac. 1092.] The section of the statute cited is applicable to legislative acts, and not to ordinances, which are mere by-laws of a municipal corporation. In *Humboldt* v. *McCoy*, 23 Kan. 249, it was held that the constitutional provision that "no bill shall contain more than one subject, which shall be clearly expressed in its title," has no application to city ordinances. Again, in *New Kiowa* v. *Craven*, 46 Kan. 114, 26 Pac. 426, it was decided that a section of the statute concerning county jails had no application to city prisons or jails. While the rules of construction of statutes and ordinances may be the same, yet it does not follow that a statutory provision concerning the effect of the repeal of a law can be extended to include city ordinances.

The real-estate agents were engaged in an unlawful vocation at the time they made the sale of the real estate for which they claim a commission. There was no right of recovery of this commission at the time the sale of the land was made, and the authorities are almost unanimous to the effect that a subsequent repeal making the act lawful will not act retrospectively, so as to render that lawful which was done in violation of the law. Sutherland, Stat. Constr. §§ 336, 480. In Lawson, Contr. § 279, it is said: "Where a contract made in violation of a statute is void, the subsequent repeal of the statute does not make it valid." 2 Parsons, Contr. § 674, states the proposition thus: "But if one agrees to do what is at the time unlawful, a subsequent act making the act lawful cannot give validity to the agreement, because it was void at its beginning." See also Endlich, Interpretation of Statutes, § 488; Clark, Contr. 507; Bishop, Contr. § 479; *Roby* v. *West*, 4 N. H. 285, 17 Am. Dec. 423. The case of *Bailey* v. *Mogg*, 4 Denio, 60–62, is in point. It is there said: "But, while the Revised Statutes were in force, he could not compel payment for his services as an unlicensed physician whatever remedies might have been prescribed and administered. Such was the law in 1840, when the services were rendered, and as to his case it was the same in 1845, when the cause was tried. The repeal of the previous prohibitory laws by the act of 1844 had no effect upon cases which arose before that act was passed." *Woods* v. *Armstrong*, 54 Ala. 150, 25 Am. Rep. 671; *Handy* v. *St. Paul Globe Pub. Co.* 41 Minn. 188, 4 L. R. A. 466, 42 N. W. 872; *Puckett* v. *Alexander*, 102 N. C. 95, 3 L. R. A. 43, 8 S. E. 767.

Cases cited by counsel for plaintiffs in error, holding that no sentence can be pronounced for violation of a criminal statute which has been repealed without a saving clause, are not in point; nor decisions to the effect that procedure in pending actions must be governed by the law as it stands at the time of trial, not when the action is brought. In 15 Am. & Eng. Enc. Law, p. 942, and note, a large number of authorities are collected upon the principal question.

The judgment of the Court of Appeals will be affirmed.

All the Justices concur.

Rehearing denied.

KENTUCKY COURT OF APPEALS.

Charles P. WEAVER, Mayor of Louisville, *et al.*,
v.
Sterling B. TONEY.

(..... Ky. .....)

1. **A writ of prohibition** to stay proceedings by an *inferior tribunal in excess of* its jurisdiction may be granted by the Kentucky court of appeals.
2. **A mandatory injunction order which grants the whole relief** obtainable in the suit, and obedience to which will be the end of the litigation, is void if issued without notice, under Civ. Code Prac. § 276, amended by Laws 1894, p. 201, and cannot be sustained as a mere temporary restraining order.
3. **Irreparable injury that may result from the delay requisite to the giving of notice** for an injunction will not be sufficient to justify the failure to give notice, when there is no excuse for not filing the suit earlier while there was time to give the notice.
4. **A faction of a political party**, which is not, and does not claim to be, in itself a distinct political party, is not entitled to have inspectors at an election, under Stat. § 1481.
5. **The right to have an inspector at**

NOTE.—As to injunction to protect political rights, see Fleming v. Guthrie (W. Va.) 3 L. R. A. 53; Alderson v. Kanawha County Ct. Comrs. (W. Va.) 5 L. R. A. 334; Fletcher v. Tuttle (Ill.) 25 L. R. A. 143; Green v. Mills (C. C. A. 4th C.) 30 L. R. A. 90; Fesler v. Brayton (Ind.) 32 L. R. A. 578; State *ex rel.* Cranmer v. Thorson (S. D.) 33 L. R. A. 582; Kearns v. Howley (Pa.) 42 L. R. A. 235; and State *ex rel.* McCaffery v. Aloe (Mo.) 47 L. R. A. 393.

the polls, who is appointed by the executive committee of a political party, is a political right which cannot be enforced in a court of equity.

(December 9, 1899.)

PETITION for a writ of prohibition to restrain defendant from punishing defendants in a proceeding to compel the admission of inspectors to voting places for contempt. *Writ granted.*

The facts are stated in the opinion.

Messrs. **Kohn, Baird, & Spindle** and **Zach Phelps** for plaintiffs.

Messrs. **Helm, Bruce, & Helm** for defendant.

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

At about midday of Monday, November 7, 1899,—the day of the recent state election,—the Honorable John Young Brown, the gubernatorial candidate of the Honest Election Democratic party, filed his petition in equity in the Jefferson circuit court, law and equity division, against Charles P. Weaver, mayor of the city of Louisville; Lyons, Tierney, and Suter, members of the board of public safety; Jacob H. Haager, chief of police; and some 750 other defendants, who were officers of election at the various voting precincts in Louisville on the day in question. The purpose of the suit was to have an injunction commanding the election officers to admit to the voting places as soon as the polls should close, at 4 o'clock, one person as inspector at each voting place, as representative of the Honest Election Democratic party. The vital ground of complaint was that the county board of election commissioners for Jefferson county, acting by a majority, had theretofore (that is, prior to November 6, 1899, as the petition was sworn to on that date) issued written instructions to the officers of election to the effect that inspectors or representatives of the Honest Election Democratic party were not to be admitted to the polls, and that unless controlled by the order of the court the officers of election would obey these instructions. The plaintiff further averred that he feared and charged that the mayor, board of public safety, and chief of police either had issued, or would issue or cause to be issued and enforced, unless restrained by the court, instructions to the police not to allow such inspectors to enter the voting places, and to arrest any who attempted to do so. It was further averred that irreparable injury would result to plaintiff from the delay in giving notice of the application for the injunction, and a temporary order was therefore prayed for, embodying the relief sought in the petition: the temporary order, indeed, embodying the whole of the relief sought. Such orders were thereupon at once issued, signed by the judge of the court mentioned, commanding the election officers to admit at the close of the polls the inspectors of the party named, provided they presented a certificate from one Wright, chairman of the committee of the Honest Election Democratic party, and commanding the mayor and board of safety not to give to any policeman of the city any order to interfere with such inspectors, and commanding the chief of police to instruct the policemen that such inspectors had the right to enter the voting places and witness and inspect the count. The orders thus obtained further recited that on November 14, 1899 (time and place stated), the plaintiff would move the court to grant an injunction pursuant to the prayer of his petition. Subsequent to the granting of the temporary writ, and prior to the day on which the injunction proper was to be asked, on complaint by certain inspectors of the party named in the order, who had been refused admittance to the voting places, rules of contempt were issued by the judge who had issued the writ of the 7th against certain of the defendants in the Brown-Weaver action, and certain others, requiring them to appear and show cause why they should not be punished for disobeying the order of the 7th of November. Thereupon the persons so ruled, together with other defendant in the Brown-Weaver suit, filed their petition in this court on November 15 for an order prohibiting the judge of the court aforesaid or that court from proceeding further with the trials for contempt. A temporary stay was granted, and a day set for full hearing, which, having been had, after answer filed by the judge aforesaid, the case is now out for decision.

The first question raised is as to the jurisdiction of this court to make the order. The case has been presented by counsel as one involving solely the jurisdiction of the lower court to issue the mandatory order of the 7th of November, and for the present we shall so consider it. Assuming, then, preliminarily, that the lower court had no jurisdiction to enter such an order, the question remains, Has this court—admittedly one of appellate jurisdiction only—power to control inferior courts when acting outside of their jurisdiction? In *Preston* v. *Fidelity Trust & Safety Vault Co.* 94 Ky. 295, 22 S. W. 318; *Goldsmith* v. *Owen*, 95 Ky. 420, 26 S. W. 8, and *Louisville Sav. Loan & Bldg. Asso.* v. *Harbeson*, 21 Ky. L. Rep. 278, 51 S. W. 787, the power of this court to issue writs of prohibition seems to have been assumed, rather than in terms asserted: the writs sought being denied because it did not appear that the inferior courts were proceeding out of their jurisdiction. All these cases present very persuasive evidence in support of the jurisdiction. And in *Hindman* v. *Toney*, 97 Ky. 413, 30 S. W. 1006, this court expressly settled the question, and, on the petition of Hindman, granted a writ prohibiting one of the circuit judges of Jefferson county from passing on the case, which properly had been assigned to another division of that court. And the writ was awarded, it may be said here, although by express statute (Ky. Stat. § 1028) no proceedings in a case were to be invalid because prosecuted in the wrong branch of the Jef-

ferson circuit court. It was hardly a question of jurisdiction in the lower court, therefore, but rather a question of preventing confusion and conflict in the conduct of business in the four branches of that court. It was held in that case that this court, having a discretion, ought not generally to issue writs of prohibition, when adequate relief can be afforded complainants by resort to the "revisory power,"—meaning the appellate jurisdiction of this court. In view of these cases, it must be regarded as settled law that in proper cases, where the inferior tribunal is proceeding out of its jurisdiction, the power of this court may be invoked to stay the exercise of such jurisdiction; and it would also seem, in certain classes of cases, that even where the inferior tribunal has jurisdiction this court may likewise interfere, if the remedy by appeal is not entirely adequate, or if the court, in the exercise of its discretionary powers, shall deem it necessary to so interfere.

Looking at the case for the present in the light of the way it has been presented (that is, as involving the jurisdiction of the lower court), we find it to be contended first that that tribunal is without power to inflict punishment for disobedience of its order of the 7th of November, because that order was made without notice to any of the parties to be affected by it. It is conceded that the order was issued without notice, and it is clear that, if notice was necessary, disobedience of it would not be punishable contempt. That notice is necessary is, we think, equally clear; otherwise, there would be judgment entered, final in its character, and decisive of the whole question before the court, without citation or opportunity offered to the parties interested to resist the application. To proceed without notice would be a final adjudication upon and a deprivation of a right, without due process of law. Under general law, as well as under our statute, there must be notice in mandamus proceedings before such an order can be granted. And this is equally true when the proceeding is for an injunction. The statute is explicit, and declares that "an injunction shall be granted only upon reasonable notice, in writing, to the party sought to be enjoined, of the time and place of the application therefor, and of the court or officer to whom the application is to be made." Civil Code Prac. § 276, amended by Laws 1894, p. 291. Where, however, the court or officer to whom the application for an injunction is made "shall be satisfied by the facts set forth in the affidavit of the applicant, or by other evidence, that irreparable injury will result to the applicant from the delay of giving notice, the court or officer may enter a temporary order restraining the act or acts sought to be enjoined, or it may be mandatory in its nature, if the case so require." This provision for a temporary restraining order has no application to the case at hand. The order is not a mere temporary restraining order, mandatory in its nature. The relief sought and granted is the whole relief obtainable. When the order is obeyed the end of the litigation is reached. There is no mere temporary stay, with reservation of the rights of parties until they can be heard. If a railroad is about to stop operating a road it is under a contract to operate, it may be enjoined from stopping, and be commanded to continue the operation temporarily. This may result in some temporary inconvenience or pecuniary loss, but the subject-matter of the litigation is left for future investigation, and the rights of the parties are reserved. This is a fair illustration of what this provision means. And so it is further provided in the section *supra* that the court or judge "shall set forth a reasonable time and place not to exceed ten days from the day upon which the order is made, at which the applicant shall move the court or judge to grant the injunction," etc. If we attempt to apply these Code provisions to a case where the act commanded to be done is not of a mere temporary matter, but is practically a finality, and the sum total of the relief sought by the applicant, we must appreciate at once the inapplicability of the section. Imagine the applicant in this case applying to the judge on November 14 for an injunction commanding the election officers to admit the Brown inspectors to the voting places on November 7! The order made to admit the inspectors is a peremptory mandamus, and "where a peremptory mandamus is granted without the service of notice the mandamus is void, and a respondent who has not been served with notice cannot be punished for contempt for not obeying the writ." 13 Enc. Pl. & Pr. 759, *citing State ex rel. Nicolin* v. *Scott County Comrs.* 42 Minn. 284, 44 N. W. 64; *Jones* v. *McMahan*, 30 Tex. 719; *United States* v. *Labette County*, 7 Fed. Rep. 318. "When a court of chancery is without authority, its injunction is a nullity, and it is not contempt of court to disregard it." *Ex parte Wimberly* (Miss.; 1880) 1 Ky. L. Rep. 127. This so-called temporary restraining order is in substance imperatively mandatory, and we must look at the substance, and not the shadow, of things.

In the second place, even the law authorizing a temporary restraining order without the service of notice, if irreparable injury may result from the delay of giving notice, does not apply here, because no such condition of fact is shown to exist. The petition was sworn to on November 6, 1899, and the averment is that the election commissioners had issued written instructions to the precinct officers not to admit the Brown inspectors, and that unless restrained the precinct officers would obey their instructions. Manifestly, on this showing, the applicant, on November 6th, and even before that day, was as fully aware of the expected obedience of the precinct officers to the written instructions of the commissioners as he was at noon on the 7th; and he had the same grounds on the 6th, and before that day, for the belief that they would obey these instructions, as he had on the 7th. He could not, therefore, wait, in order to get an *ex parte* order, until he could technically and per-

haps truthfully say he would suffer irreparable injury from the delay of giving notice. Thus, an Indiana statute provided that no injunction should be granted, except in cases of emergency, until the adverse party had had previous notice, etc. In *Vance* v. *Workman*, 8 Blackf. 306, a bill was filed to restrain the defendants from selling certain land upon execution; and, although the bill was filed on the same day the sale was to take place, it was held not to be a case of emergency, the court saying: "True, the bill was filed on the day on which the sale which the injunction was to prevent was to take place; but no excuse is offered, no reason assigned, why it was not filed earlier, nor for the failure, if there was a failure, to give the ten-days' notice of the intention to file it." In *Indiana C. R. Co.* v. *State*, 3 Ind. 424, a railroad company commenced the construction of its road on the land of the complainant, and was making excavations thereon, and preparing to lay down its track, when complainant obtained an *ex parte* writ to enjoin the company. The court held there was *not* a case of emergency, within the meaning of the statute. In referring to the *Vance-Workman Case*, the court said: "The principle here asserted is that the complaining party must not only show that an immediate injury is about to be inflicted, but also that he could not reasonably have anticipated it in time to give the requisite notice. Otherwise, the complainant might always make a case of emergency, by waiting until the act he desires to have restrained is upon the point of being done." In the case at hand, the applicant for the injunction, at a date when there was apparently still ample time to give the reasonable notice required by the law, is found saying that he is in possession of facts which cause him to believe that he will be irreparably injured from the delay of giving notice. If there was in fact not time to give notice on the 6th, the petition ought to have disclosed the fact. It is not, therefore, a case where notice can be dispensed with; but, on the contrary, it is a case where the face of the application shows that notice was demanded by the very terms of the statute, and where, therefore, the court was without statutory authority to issue the writ, except after notice. It may be admitted that, if the order was in fact and in substance a mere temporary restraining order, the question of whether irreparable injury might result from the delay in giving notice would be addressed to the chancellor's discretion, and his order would be merely an error, if he abused his discretion. But when the order is final in its character the question becomes in a measure a jurisdictional one. As we have seen, the writ of prohibition may go, in a certain class of cases, even if the inferior tribunal may have, in general, jurisdiction of the subject-matter of the litigation. Such was the situation in the *Hindman-Toney Case*. So, in *St. Louis, K. & S. R. Co.* v. *Wear*, 135 Mo. 230, *sub nom. State ex rel. St. Louis, K. & S. R. Co.* 33 L. R. A. 348, 36 S. W. 363, the chancellor was held to have jurisdiction in vacation without notice to appoint a receiver of a railroad company. But, because the time for hearing was put some three months in the future, the court held it was an arbitrary exercise of judicial power, and granted a writ of prohibition staying the execution of the order for the receiver. The court held that an excessive and unauthorized application of judicial force, although in a case otherwise properly cognizable by the court or judge in question, may be prevented by prohibition, and that "no temporary receivership can rightly be set up, to last three months, without affording first a hearing to the party whose possession of property is determined by such an order."

Before leaving this branch of the case, it is proper to notice that, while we have treated the order of the 7th of November as a command to admit the Brown inspectors, and therefore as purely mandatory in character, still that order may be regarded as one likewise preventive in character, and as forbidding the defendant officers from interfering with the admission of the inspectors to the polls. But, whether the order be regarded as of the one or the other character, it is a final order, in all essential respects, and not a merely temporary one.

Issues are also joined in the pleadings on the question whether the Brown party was entitled to inspectors. This is a matter which might eventually be raised on appeal. But as yet there is no final order or judgment from which an appeal can be taken, and may never be. There is certainly no occasion for further order in the lower court respecting this question, the former order having fully accomplished the object sought in the petition. Barring the views already presented, there would seem, therefore, to be no adequate remedy for those about to be imprisoned under what is claimed to be an erroneous decision, unless the question is considered on this application. We think, therefore, the question is fairly raised on the record. If we are right, however, on the matters heretofore discussed, little need be said on this last question. From the averments of the pleadings, the exhibits filed, and such of the current history as we may fairly take into consideration, we are of opinion that the Honest Election Democratic party is a part and parcel and faction of the regular Democratic party; differing from the regular party in some of the local and state issues, but indorsing the utterances of the platform and principles of the regular Democratic party as expressed in its last national convention. We do not think it is a distinct political party, nor do we think it has ever claimed so to be, or so regarded itself. And while it may or may not be true that only such political parties as cast 2 per cent of the vote at the previous election are the political parties entitled to inspectors under the statute, we think it reasonably clear that right is conferred on such a body or party as constitutes a distinct political party. In the *McKinley-Citizens Party Case*, 6 Pa. Dist. R. 109 [10 Am. & Eng. Enc. Law, 2d ed. p. 641], it is said: "In order to consti-

tute a body of electors a political party, it must have distinct aims and purposes, being united in opposition to other bodies in the community within which it exists. A mere faction of an established party will not constitute a distinct political party," etc. Our statutes (subsection 3, par. 1596) provide that the county board shall appoint two judges, one clerk, and one sheriff at each voting precinct, and, "so long as there are two distinct political parties in this commonwealth, the judges, clerk, and sheriff of election . . . shall be so selected and appointed as that one of the judges at each place of voting shall be of one political party, and the other judge of a different party; and there shall be the like difference at each voting place between the sheriff and clerk of election," etc. And further: "Each political party may appoint one challenger for each precinct, who shall be entitled to stay in the room, or at the door thereof." Ky. Stat. § 1470. And again: "The county executive committee of each party having a ticket to be voted at an election may designate a suitable person to be present at, witness, and inspect the counting of the vote in each precinct, who shall be admitted to said voting place." Id. § 1481. The law does not confer this right to have inspectors on any individual, or group or party of individuals, as such, but, as we think, on each political party. And not on it, unless it had a ticket to be voted at the election. A single individual might have his name placed on the official ballot, by petition or otherwise, as the sole representative of a known political party; if so, his party is entitled to inspectors; or a group of candidates might have their names so placed, and, as representatives of their political party, they would be entitled to inspectors; or it may be that a new political party may be formed, with distinctive aims and purposes, and not allied with any of the existing parties, and be entitled to such inspectors. But in every case the right must rest on the fact that the individual or group or list of candidates is the representative of a distinct political party, and not the representative merely of a part or faction of an existing political party. We think, therefore, without elaborating the point further, that candidate Brown was not entitled to have the inspectors.

An important matter urged by counsel for the plaintiff in the application, and to which we shall now refer, is that the right of the candidate Brown to have admitted to the polls an inspector who is appointed by the executive committee of his party is a political right, and therefore not one enforceable in a court of equity. This contention is supported by the elementary writers, and by numerous decisions in the courts of other states, as well as by several of this court. We note, among other cases, that of *Fletcher v. Tuttle*, 151 Ill. 41, 25 L. R. A. 146, 37 N. E. 683, where the doctrine is thus aptly stated: "The question then is whether the assertion and protection of political rights, as judicial power is apportioned in this state between courts of law and courts of chancery, are a proper matter of chancery jurisdiction. We would not be understood as holding that political rights are not a matter of judicial solicitude and protection, and that the appropriate judicial tribunal will not, in proper cases, give them prompt and efficient protection, but we think they do not come within the proper cognizance of courts of equity." And in *Sheridan v. Colvin*, 78 Ill. 237, the same court approved the doctrine announced in Kerr, Inj. §§ 1–3, that "it is elementary law that the subject-matter of the jurisdiction of the board of chancery is civil property. The court is conversant only with questions of property and the maintenance of civil rights. Injury to property, whether actual or prospective, is the foundation on which the jurisdiction rests. The court has no jurisdiction in matters merely criminal or merely immoral, which do not affect any right to property. Nor do matters of a political character come within the jurisdiction of the court of chancery. Nor has the court of chancery jurisdiction to interfere with the public duties of any department of government, except under special circumstances, and where necessary for the protection of rights of property." In *Alderson v. Kanawha County Comrs.* 32 W. Va. 640, 5 L. R. A. 334, 9 S. E. 868, it was held that elections are essentially political, and courts have no jurisdiction by injunction to interfere. In *Re Sawyer*, 124 U. S. 200, 31 L. ed. 402, 8 Sup. Ct. Rep. 482, it was held that a court of equity has no jurisdiction of crimes, or any matters political, or of any matters purely administrative in their nature. So, in *Peck v. Weddell*, 17 Ohio St. 283, it was said that a court of equity had no jurisdiction to enjoin an election officer from recording an abstract of a vote, although the vote about to be recorded was charged to be fraudulent; that the only mode of purging an election of fraud was by a contest, and by executing the criminal laws. See also High, Inj. §§ 1312–1315. Our own decisions are no less emphatic, where the question has been considered. In *Common School Dist. No. 88 v. Garvey*, 80 Ky. 164, the principal objection urged against the validity of an election in a common-school district, with reference to the imposition of a tax, was, as the court said, "as to the manner in which the judge of the election was chosen," and it was said: "It is not pretended that the law did not authorize the imposition of such a tax, or that the property levied on was exempt from taxation; so there is nothing in the record that will authorize the chancellor to adjudge the election void and the taxation illegal. And, although this is not strictly an election, the door of a court of equity will not be opened to those whose only purpose is to invite the chancellor to supervise the action of judges of an election, . . . and, if so, to declare the election void, or some other person than the one chosen [as judge of the election] to have been elected." And the court held that whether an action against the judge of the election for usurpation of office could be maintained,

or proceedings by quo warranto be instituted, was a question not necessary to decide, but that "it is certain that the chancellor will not exercise such a jurisdiction;" citing Cooley, Const. Lim. p. 779. In *Clarke* v. *Rogers*, 81 Ky. 47, *Judge Pryor, for the* court, said: "A court of equity is asked, in effect, to hold another election for the purpose of determining who were legal voters, and to purge the polls by striking from the list of recorded votes those who had no *right to participate in the election.* The testimony for and against the right of the citizen to vote is asked to be weighed by the chancellor, and determined from the testimony. A court of equity should neither invite nor claim such a jurisdiction." And the court said further that "it would be enlarging the field of equity jurisdiction to determine that it is the duty of the chancellor to investigate the rights of the citizen at the ballot box in the election," etc.

It is claimed that a number of recent cases hold to the contrary. We do not so find. Several agreed cases have been considered where the object sought was to test the constitutionality of certain statutes, and this court has considered the cases on their merits. No reference in the court below or in this court was made to the question of chancery jurisdiction. In *Berry* v. *McCollough*, 94 Ky. 247, 22 S. W. 78 (a case also relied on by the defendants), the question of the power of the chancellor to entertain the question involved was made by the appellee; but the court expressly waived the point, and decided the case for the appellee on other grounds. But it may be noted that in that case appellant, the actual incumbent of the office, charged that the appellee was an *intruder, and was embarrassing the plaintiff* in the discharge of his public duties. This was also true in the *Hopkins-Swift Case*, 100 Ky. 14, 37 S. W. 155. And these averments are held generally to confer jurisdiction on courts of equity. 2 High, Inj. § 1315. *It is said, however, that in these* cases, tried below in equity, and heard here on appeal, the judgments below must have been treated as wholly void, unless we had regarded the chancellor as having jurisdiction, because neither the parties nor the court could waive the question of jurisdiction. If by "jurisdiction" reference is had solely to the power of the court to entertain the question presented, then there could be no waiver or agreement conferring jurisdiction. But, when we speak of lack of power or jurisdiction in a court of equity to consider other than questions of civil rights, we have reference solely to the occasion for the exercise of the court's power. Thus, in *People ex rel. Gaynor* v. *McKane*, 78 Hun, 154, 28 N. Y. Supp. 981, the distinction was pointed out between the use of the term "jurisdiction" as referring to the power of the court to hear and determine the application for the injunction, and the use of that term as referring to the occasion for the exercise of the court's power, which is "equitable jurisdiction," the court saying: "This distinction, while clearly pointed out in the best works on equity jurisprudence, has not always been observed in judicial opinions; and the expression 'jurisdiction' has been used when the writers meant only to inquire whether the facts before the court presented *a case for the proper exercise of the power* of a court of equity." While in this state, as in New York, legal and equitable actions are, in a measure, blended as to form, principles remain the same, and the chancellor, unless he is so empowered by statute, will not interfere by injunction where previous to our Code he could not do so. See also *Woodruff* v. *Fisher*, 17 Barb. 224. The litigants may therefore waive objection to the form of the action, and the judgment will not be so wholly void that it may be attacked in a collateral proceeding. Still, as we have already seen, as in the Missouri case cited, a writ of prohibition may be applied for to stay the chancellor if proceeding beyond his equitable jurisdiction.

It is said, however, that the remedy by mandamus is wholly inadequate in cases of this kind, because there can be no such writ issued until there has been a refusal or omission to do the act required of the delinquent, and to wait until after this refusal or omission would be to wait until the wrong was done. That such a writ will not be awarded ordinarily until after demand or refusal is true; but when the act required to be done involves the discharge of a public duty the rule seems not so strict, but the writ may go, if the conduct and *statements of the delinquent* show that he does not intend to perform his duty. Thus, in *Morton* v. *Comptroller General*, 4 S. C. N. S. 431, it was held that, where an officer charged by law with performance of a duty on or before the day *fixed by law gives notice that he does* not intend to perform that duty, mandamus lies to compel him. 10 Enc. Pl. & Pr. 618. But if the rule is otherwise, and mandamus may not be granted in anticipation of a supposed omission of duty,—and this view, it may be admitted, is supported by the weight of authority (High. Extr. Legal Rem. 312),—still there could rarely be cases of serious hardship. The presumption is that officers will ordinarily perform their duties, and especially so when heavy penalties are prescribed for failure to do so. The right of the judiciary to interfere with the administrative processes provided by law for the conduct of an election, if it exists at all, ought to be rarely exercised. The law has imposed on certain executive and administrative officers the duty of conducting elections, and it is of the utmost importance that, in the exercise of the powers and the discharge of the duties and responsibilities confided to such officers, they should not be controlled or interfered with, at least while engaged in the actual duty of holding the election. Moreover, instances of such interference will be the rarer, because generally the performance of the various duties imposed on the officers will be found to involve the exercise of intelligent discretion and judgment, and this quasi-judicial function is confessedly without the sphere of judicial interference. In

the case at bar the proper construction of the law as to inspectors may not be the subject-matter of such discretion, but whether the claim of the Honest Election Democratic party that it is a party within the meaning of the statutes, and is therefore entitled to inspectors, is well founded, depends, not merely on a proper construction of the law, but, as we have seen, on the existence of important facts making or not making it a "party," within the meaning of the statutes, and which facts must be investigated and passed on by the precinct officers. Thus, in *Taylor* v. *Kolb*, 100 Ala. 603, 13 So. 779, it was held that a court has no jurisdiction, even by mandamus, to compel election officers to name election inspectors under a statute providing that such inspectors were to be appointed from opposing political parties. In *Dalton* v. *State ex rel. Richardson*, 43 Ohio St. 652, 3 N. E. 685, it was held that a court has no jurisdiction, even by mandamus, to compel election officers to certify or reach certain results. The doctrine is fully enunciated in High, Extr. Legal Rem. §§ 42–46.

On the whole case, we conclude that the chancellor was without jurisdiction to control or direct the plaintiffs in the manner sought, and therefore *the writ of prohibition heretofore temporarily granted is now made perpetual.*

Petition for rehearing overruled.

MISSISSIPPI SUPREME COURT.

Sophie MURPHY, *Appt.*,
v.
INDEPENDENT ORDER OF THE SONS AND DAUGHTERS OF JACOB OF AMERICA.

(.....Miss.....)

1. **Provisions in by-laws of a mutual benefit association,** that any member three months in arrears shall be declared nonfinancial, and that any member failing to visit the lodge shall stand suspended until a prescribed fine is paid unless he has a lawful excuse, do not make a member nonfinancial for failure to pay dues until he is three months in arrears and he has been declared nonfinancial.
2. **Failure to pay assessments** will not subject a member of a mutual benefit society to suspension without notice of the arrearage, where the by-laws require each member to be notified as to arrears.
3. **Wilful failure of the lodge officers to do their duty** towards collecting a death claim of a member of a mutual benefit society will not forfeit the rights of the beneficiary who has done all she can in compliance with the rules of the association.
4. **Failure of a subordinate lodge** of a mutual benefit society to remit an assessment to the grand lodge will not forfeit the rights of a member, although the by-laws provide that the grand lodge shall not be held for neglect of duty of subordinate lodges.

(April 3, 1899.)

APPEAL by complainant from a decree of the Chancery Court for Hinds County dismissing a complaint filed to compel payment of the amount alleged to be due under a mutual benefit certificate. *Reversed.*

NOTE.—*Forfeiture of benefit certificate by default of subordinate lodge.*

As shown by the opinion in the principal case, the conclusion there reached upon the question suggested by the title of the note has the direct support of Supreme Lodge, K. of P. v. Withers, 177 U. S. 260, 44 L. ed. 762, 20 Sup. Ct. Rep. 611; and Schunck v. Gegenseitiger Wittwen und Waisen Fond, 44 Wis. 375, and Austerlitz v. Order of Chosen Friends, 14 Nat. Corp. Rep. 630.

In the former case the United States Supreme Court holds that the failure of the secretary of a subordinate branch or section of the Knights of Pythias to transmit to the general board of control within the time specified by the general laws of the order moneys paid to him in due time by a member will not be ground for the forfeiture of the policy, since the secretary's negligence is not chargeable to the member, but is that of an agent of the order, notwithstanding a provision in the general laws of the order to the effect that he is to be regarded as the agent of the member and not of the order, where the general laws also require the member to pay dues to such secretary only, and provide that the secretary shall transmit immediately after the tenth of each month all moneys collected by him, and that the local branch shall be responsible to the board of control for all such moneys collected by the secretary. The court disposes of the obstacle presented by express provision that the secretary *is to be regarded as the agent of the member* and not of the order by holding that, as applied to the payment of dues, it is opposed to the facts of the case, and that the secretary is in reality the agent of the Supreme Lodge from the time he receives the payments, and that the insured is not responsible for his failure to remit. The court emphasizes the fact that under the laws of the order the member is bound to pay his dues to the secretary, and has no means of enforcing the latter's duty to remit the same to the Supreme Lodge.

The court in that case, as does the court in *the principal case, cited, in support of its position*, a number of cases dealing with the general question as to the effect of provisions in policies of insurance, that the person procuring the insurance shall be deemed the agent of the insured, and not of the insurer.

A judge of the superior court of Illinois, in an oral opinion in Austerlitz v. Order of Chosen Friends, reported in 14 Nat. Corp. Rep. 630, also held that the officers of the subordinate lodge of a benefit order were the agents of the supreme council, rather than of the members of the lodge, with reference to the duty enjoined upon them by a by-law requiring the secretary of the subordinate council to certify to its treasurer the amount due on each assess-

Statement by **Whitfield**, J.:

In December, 1896, Delia Murphy joined the Independent Order of the Sons and Daughters of Jacob of America, a benevolent institution, and received a benefit certificate showing that she was a member, and that upon her death the beneficiary therein, her mother, would be entitled to a sum of money equal to 25 cents for each member in good standing in the order. At the same time she received a membership card, upon which all payments of dues, assessments, etc., were entered. Delia died in May, 1898. The order refused to pay anything on the certificate held by her, and her mother, Sophie Murphy, filed the bill in this case in the chancery court of Hinds county, seeking to recover the amount due on it, and asking discovery as to the number of members in good standing. She alleges in her bill that Delia Murphy was accepted as a member in the defendant company, and complied with all the rules and regulations thereof until her death, and had paid all the assessments, dues, and fines up to and including the month of June, 1897; that in the early part of June, 1897, she met with a serious accident by stepping on a nail, from the effects of which she was prostrated on a bed of sickness, and from which she never recovered; that she promptly notified the officers of Madison Lodge, No. 218, of said order, located in Jackson, Mississippi, the local lodge in which she held her membership; that she was very poor, and it became the duty of the subordinate lodge to which she belonged, under the constitution and by-laws of the order, to provide for and care for her during her sickness, and that the proper officers of said lodge promised and agreed to do so to the

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ment, and to forward the amount so certified to the supreme treasurer. The opinion points out that the agency provision as applied to the payment of assessments is opposed to the general scheme of the laws under which the body is working, calling especial attention to a provision making the subordinate council and all its members liable to suspension for failure to remit an assessment within a time limited, and stating that such provision can only be explained on the theory that the subordinate council acts for the supreme council, and not for its own members, since there would be no reason why a subordinate council should be suspended for nonpayment or failure to forward assessments if that council were acting solely as the agent of its members.

The Wisconsin supreme court in Schunck v. Gegenseitiger Wittwen und Waisen Fond, 44 Wis. 375, also held that the default of a local grove of a beneficial order in forwarding to the directory dues promptly paid by the members did not operate to forfeit or suspend the right of the members, notwithstanding a provision of the constitution that "everyone whose assessment is not paid by his grove to the directory within thirty days after demand made, forfeits his claims to the insurance sum, and he is not restored to his rights until thirty days after payment of all arrears is made." The court admitted the difficulty of placing a construction upon the constitution and by-laws of the order that would entirely harmonize all provisions, but held that construing such provisions in the view of the benevolent character of the order, it could not have been its intention that a member who had paid all dues should forfeit his rights in the fund because of a default of his grove, for whose acts he was in no way responsible. It does not appear in this case that there was an express provision like that in the principal case, and in Supreme Lodge, K. of P. v. Withers, 177 U. S. 260, 44 L. ed. 762, 20 Sup. Ct. Rep. 611, purporting to make the subordinate grove the agent of its members and not of the order. But it would seem that the express provision quoted above furnished, at least, as difficult an obstacle to the preservation of the member's rights, since it is by its terms, only applicable to the payment of assessments by the subordinate grove, and the denial to it of any effect for that purpose deprives it of all effect whatever, while the general provision with reference to agency may, perhaps, be effectual for other purposes, even if its effect for the particular purpose in question be denied.

The principal case is also supported by Whiteside v. Supreme Conclave, I. O. of H. 82 Fed. Rep. 275, where it was held that an agency clause similar to that in the principal case was opposed to the actual facts, and that, notwithstanding it, the collector of assessments of a subordinate conclave was the agent of the Supreme Conclave, and bound the latter by extensions of time.

As pointed out by the opinion in Supreme Lodge, K. of P. v. Withers, 177 U. S. 260, 44 L. ed. 762, 20 Sup. Ct. Rep. 611, the decision in Campbell v. Supreme Lodge, K. of P. of the World, 168 Mass. 397, 47 N. E. 109, is not an authoritative decision against the views expressed in the foregoing cases. The defendant in that case, and in Supreme Lodge, K. of P. v. Withers, 177 U. S. 260, 44 L. ed. 762, 20 Sup. Ct. Rep. 611, was the same, and the same general provision with reference to agency was involved. In Campbell v. Supreme Lodge, K. of P. of the World, however, it was admitted that a suspension of membership and forfeiture occurred by reason of the default of the secretary of the local section in forwarding the monthly payments and dues to the board of control, and the only question raised was whether the section and the members became reinstated at the time a letter remitting the dues was mailed, or at the time it was actually received by the board, under a provision that a section whose membership has forfeited their endowment, and whose warrant has been suspended, shall regain all rights as a section, and any surviving member thereof shall regain full rights and profits held previous to such forfeiture, if, within thirty days from the suspension of warrant, the section shall pay to the board of control the amount of all monthly payments, assessments, or dues accruing upon said members. The member in question died between the date of the mailing and the receipt by the board of control of the letter containing the dues. The court decided against the beneficiary upon the ground that the assessments and dues were not paid to the board of control until it had received them.

The decision in Peet v. Great Camp, K. of M. of the World, 83 Mich. 92, 47 N. W. 119, however, seems to be opposed to those cases. In that case a subordinate tent had been suspended because of the failure of the financial keeper to notify members of an assessment, and to notify the Great Camp of the names of the members who failed to pay the assessment. It was admitted that the suspension of the subordinate tent was proper and legal under the laws of the Order, which also provided that the

extent of $1 per week during her sickness, but that the lodge had neglected and failed to perform its said duty, and never paid her anything; that Delia had paid all her dues, fines, and assessments, and had fully complied with all her obligations as a member up to the time she got sick, and her sickness was not of a sexual nature, or connected with childbirth, and that she was, under the constitution and by-laws, then and there entitled to said sick benefit; that under the constitution and by-laws it became the duty and privilege of the said local lodge to deduct from the amount of said sick dues the amount of the dues, fines, and assessments, and that the amount of this sick benefit exceeded the dues, fines, and assessments she was required to pay; that said Delia was never suspended as a member, and was never declared "nonfinancial," and was never so in fact; that, in consequence of the repeated promises of the officer of said lodge during the illness of Delia to pay her the sick benefit, no effort was made by her, or anyone for her, to pay, or to see that the dues, fines, and assessments were paid, otherwise than by deducting them from the amount due her; that after the death of Delia it was the duty of the officers of said Madison Lodge, No. 218, to make affidavit of her death, and furnish the same to the grand scribe and officers of the defendant company, whose duty it was to notify the grand master, another officer of said defendant, who is required to make an assessment to pay the amount due complainant under said certificate, but that the officers of said Madison Lodge, No. 218, neglected and refused to make the affidavit or comply in any way with the by-laws in that respect, and that the defendant failed and

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suspension of a subordinate tent should operate to suspend the members thereof unless they applied to the record keeper of the Great Camp within thirty days of such suspension for a special certificate. It was claimed that the suspension was not operative against the deceased member, because he was not in fault, and had no notice of the assessment or of the suspension of the subordinate tent. The order had adopted a resolution to the effect that the subordinate tent should be deemed the agent of its members in the transmission of all dues and assessments to the Great Camp, and that the Great Camp should in no case be liable for default or negligence on the part of a subordinate tent or its officers in such transmission, or the serving of notices of assessments or suspensions. The court held that notwithstanding that this resolution was adopted after the deceased joined the order, it was binding upon him, and that his estate could not recover, he never having applied for a special certificate.

So also, the opinion in Young v. Grand Lodge of the Order "Sons of Progress," 3 Pa. Dist. R. 209, 34 W. N. C. 100 (affirmed in 173 Pa. 302, 33 Atl. 1038, on the opinion below) takes the view that a provision of the constitution to the effect that lodges in default shall forfeit their claim on the endowment fund operates to deprive the members of their right to participate in the endowment fund when there has been a suspension of the subordinate lodge according to the rules, formalities, and methods required by the constitution, but holds that it is not a sufficient defense to an action for a benefit to show that the subordinate lodge is in default, but that it is also necessary to show that there has been a suspension in accordance with the constitutional requirements.

The court in O'Connell v. Supreme Conclave K. of D. 102 Ga. 143, 28 S. E. 282, said that whether the act of an officer of a subordinate lodge of a given order is, in a particular instance, binding upon the Supreme Conclave of the order, depends upon the relation of the former to the latter as defined by its constitution and by-laws, and upon what is therein provided; and hence that it could not, in the absence of necessary information on those points, be intelligently determined whether or not the payment of an assessment to an officer of the subordinate lodge would, in legal contemplation, be a payment to the Supreme Conclave.

The reluctance of the courts to hold that the default of the subordinate lodge or its officers operates to extinguish the rights of the members or their beneficiaries is illustrated by the following cases, which avoid such a result by construing the rules or orders of the association favorably to them.

Supreme Lodge, K. of H. v. Abbott (Ind.) 11 Ins. L. J. 907, held that an order made by a fraternal society to the effect that any lodge failing to forward assessments to the supreme treasury within thirty days from the date of notice should stand suspended, "and that if a death should occur in said lodge during said suspension no death benefit should be paid," only operated to suspend payment during default of the subordinate lodge, and that after the reinstatement of the lodge recovery could be had upon the certificate of a member who died in the interval between the suspension and the reinstatement.

So, also, Washington Camp v. Funeral Ben. Asso. 8 Pa. Dist. Rep. 198, held that a by-law providing that any Camp neglecting to pay assessments for thirty days after notice "shall be fined ten cents for each and every member on their roll, and be suspended and debarred from all participation in the fund until all arrearages and fines shall be paid, and should the refusal or neglect continue for the space of thirty days additional, shall be dropped from the roll," only imposed, as a penalty for delay, the fine of ten cents per member and the delay of payment of any benefits until the neglect was cured, and that it did not operate to cut off the rights of beneficiaries of members dying during the additional period of thirty days.

And Supreme Lodge Nat. Reserve Asso. v. Turner, 19 Tex. Civ. App. 346, 47 S. W. 44, held that the suspension of a subordinate lodge of a benefit society under a by-law providing that any subordinate lodge may be suspended and members under it deprived of all benefits from the death-benefit fund by the supreme president, whenever such subordinate lodge shall refuse or neglect to pay its assessments to the general or death-benefit fund within the legal time, did not operate to suspend the members of the lodge, but merely fixed a penalty upon the members of a suspended lodge by refusing to permit a member of such lodge to participate in the death benefit during such suspension; and that it was not necessary for the individual members to apply for reinstatement.

This review of the cases in which the exact question suggested by the title of the note is decided shows that the weight of authority supports the conclusion reached in the principal case. G. H. P.

refused to make an assessment, or take any steps towards the payment of the amount due complainant; that three disinterested members of said Madison Lodge, No. 218, made an affidavit of the death of Delia, and of her good standing in the order, and that said affidavit was delivered to the grand master of the defendant company. The bill prays that the defendant be compelled to state the number of its members subject to assessment, and that an assessment be made as required by the terms of said certificate and the constitution and laws of the order, and that it be paid to the complainant. A copy of the constitution and by-laws was made an exhibit to the bill. These by-laws contained the following stipulations: Art. 3, § 5: "Each member shall pay in his lodge treasury not more than seventy-five cents per month dues, and no member shall allow his dues to exceed three successive months." Section 7: "Each and every member shall pay their assessments within thirty days from date of notice if issued under the law for collecting after the death of a member, but, if issued under the advance assessment law, within sixty days, or stand suspended." Art. 5, § 7: "Any member who is three months in arrears, including dues, fines, taxes, etc., shall be declared nonfinancial." Section 8: "Any member allowing himself to become four months in arrears, including dues, fines, taxes, etc., is hereby declared suspended." Section 20: "They shall visit their lodge at least on each regular monthly meeting, otherwise they shall be fined no less than five cents, and stand suspended until paid, unless they have a lawful excuse." Art. 7, § 1: "Every subordinate lodge shall care and provide for its sick members who are financial; provided said sickness is not of a sexual nature, or sister in childbirth. If an assessment, monthly dues, or taxation notice is before the lodge while a member is sick and receiving aid from the lodge, the W. S. shall deduct the same from the amount given to said member, and the sick committee shall notify said sick member of the same." Section 5: "When an allowance is made to a sick member the P. R. or S. C. shall draw the allowance; after paying any amount due by the member to the order, pay the remainder to the sick member." Art. 10, § 12: "If a member is nonfinancial, and gets sick, he cannot be allowed a sick benefit, and, by taking credit for the benefit, or any part thereof, straighten himself. No member, nonfinancial or suspended, when he gets sick, can straighten himself while sick, and no member who is straight when he gets sick can become nonfinancial or suspended while sick, unless his lodge becomes nonfinancial, or fails to pay its assessments." Art. 7, § 18: "The officers of subordinate lodges, encampments, and royal houses shall be held as officers only of the bodies that elect them, and the grand lodge shall not be held for any neglect or omission of duty of said officers." The defendant answered the bill, denying most of the material allegations, and relying principally on the following defenses: Delia was not "straight" with the lodge when the accident occurred or when she died. The accident did not result in permanent injury, but she was able to work, and did work, after the accident. The death did not result from the accident. The proper proof of death was not furnished, and the order is not bound by the acts of the officers of the lodge to which Delia belonged in not furnishing proof of death. The opinion states other facts. A great deal of testimony was taken in the cause, and on final hearing a decree wes rendered dismissing complainant's bill, and from that decree she appealed.

Messrs. **Brame & Brame** for appellant.
Messrs. **Calhoon & Green** for appellee.

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

Delia Murphy was not "nonfinancial" within the meaning of § 7, art. 5, and § 20 of same article, taken together, and construed strictly against forfeiture, for two reasons: First, she was not shown to be "three months in arrears" as to fines; and second, she had not been declared nonfinancial. Two provisions of a similar order, strikingly like these, were construed not to work a forfeiture without a "declaration" to that end in *Scheufler* v. *Grand Lodge, A. O. U. W.* 45 Minn. 261, 47 N. W. 799. She was, then, being "financial" when the injury occurred, entitled to the sick benefit of $1 per week, as provided in § 1, art. 6, § 5, art. 6, and § 12, art. 10. Her lodge was notified of her condition, but neglected her.

It is said that she did not herself pay assessments Nos. 20, 21, and 22. There is no evidence at all satisfactory that she was ever notified of these assessments. The last clause of § 1, art. 10, expressly made it the duty of the worthy scribe of the subordinate lodge "to notify each member as to his arrears." It is necessary that such notice should be given. This is in accordance with all the authorities. *McCorkle* v. *Texas Bener. Asso.* 71 Tex. 151, 8 S. W. 516; *Supreme Lodge K. of H. of the World* v. *Johnson*, 78 Ind. 110. A contract could, of course, be so framed as to dispense with it; but it is here required.

It is said that the proof of death was not made by the proper officers, nor in the proper mode. The appellant did all she could. The officers required by the constitution to make it out and forward it refused to do so. It cannot be that a wilful failure of these officers to do their duty in the matter can cause a forfeiture of appellant's rights, she not being in fault; and it is so expressly held in *Young* v. *Grand Council, A. O. of A.* 63 Minn. 506, 65 N. W. 933. That case properly holds that the subordinate lodge is, as to this, the agent of the grand lodge, which doctrine is well settled. 1 Bacon, Ben. Soc. §§ 118, 144. It is there said that the subordinate lodge is the agent of the grand lodge, and not of the plaintiff, in all that relates to the collecting of the assessments for death benefits, etc.

Finally, it is said that the subordinate lodge did not pay the grand lodge, even if

Delia Murphy can be regarded as not delinquent in not having paid the subordinate lodge, because not notified of assessments Nos. 20, 21, and 22, and that § 18, art. 7, is conclusive, in this view, of nonliability. The hidden purpose of said section seems to be to make the subordinate lodge the agent of the assured in all things, and to provide that its negligence shall not bind the grand lodge as principal. We say "hidden," because it is not clearly so expressed. But, as shown, the subordinate lodge, under the constitution and by-laws, taken as a whole, and the general law applicable to them, as to the facts of this case, is the agent of the grand lodge as to the payment and collection of assessments. It was expressly held in *Schunck* v. *Gegenseitiger Wittwen und Waisen Fond*, 44 Wis. 375, that the grand lodge cannot escape liability by reason of the failure of the subordinate lodge to do its duty in remitting to the grand lodge the assessment. Says the court: "The grove [the subordinate lodge here] surely acts for and represents the defendant [the grand lodge] in making the contract with the member, unless we adopt as correct the idea. . . that the member, by some one-sided arrangement, makes a contract with himself through his own agent. It seems to us that any such position as that the grove is the sole agent of the member in effecting the insurance or collecting the assessments is untenable." It may be admitted in this case, as in that, that the provisions of the constitution and by-laws are difficult to reconcile with each other, being very inartificially drawn. But the great supervening principles in the light of which they are to be construed,—that, as against forfeitures, strict construction must be had, so as to prevent a forfeiture if reasonably possible, and that in dealing with these benevolent orders liberal construction in favor of the insured is to be indulged,—applied here, satisfy us that the appellee is liable.

Since writing the above opinion, the Supreme Court of the United States, in *Supreme Lodge K. of P.* v. *Withers*, 177 U. S. 260, 44 L. ed. 762, 20 Sup. Ct. Rep. 611, has decided exactly that same point as we have. That opinion, delivered by Mr. Justice Brown, is so luminous and cogent in its reasoning that we quote, to adopt, the following: "There seems to have been an attempt on the part of the defendant to invest Mr. Chadwick with the power and authority of an agent, and at the same time to repudiate his agency. But the refusal to acknowledge him as agent does not make him the less so if the principal assume to control his conduct. It is as if a creditor should instruct his debtor to pay his claim to a third person, and at the same time declare that such third person was not his agent to receive the money. It would scarcely be contended, however, that such payment would not be a good discharge of the debt, though the third person never accounted to the creditor; much less that it would not be a good payment as of a certain day, though the remittance, through the fault of the person receiving it, did not reach the creditor until the following day. The position of the secretary must be determined by his actual power and authority, and not by the name which the defendant chooses to give him. To invest him with the duties of an agent and to deny his agency is a mere juggling with words. Defendant cannot thus play fast and loose with its own subordinates. Upon its theory the policy holders had absolutely no protection. They were bound to make their monthly payments to the secretary of the section, who was bound to remit them to the board of control; but they could not compel him to remit, and were thus completely at his mercy. If he chose to play into the hands of the company, it was possible for him, by delaying his remittance until after the end of the month, to cause a suspension of every certificate within its jurisdiction; and, in case such remittance was not made within thirty days from such suspension (§ 6), apparently to make it necessary, under § 4, for each policy holder to regain his membership by making a new application, surrendering his forfeited certificate, making payment of the required membership fee, undergoing a new medical examination, and paying a premium determined by his age at the date of the last application. In other words, by the failure of the secretary, over whom he had no control, to remit within thirty days, every member of the section might lose his rights under his certificate, and stand in the position of one making a new application, with the forfeiture of all premiums previously paid. . . . It could not thus clothe the secretaries of the sections with the powers of agents by authorizing them to receive monthly payments, and instructing them to account for and remit them to the supreme lodge at Chicago, and in the same breath deny that they were agents at all. The very definition of an agent given by Bouvier, as 'one who undertakes to transact some business, or manage some affair, for another, by the authority and on account of the latter, and to render an account of it,' presupposes that the acts done by the agent shall be done in the interest of the principal, and that he shall receive his instructions from him. In this case the agent received his instructions from the supreme lodge, and his actions were at least as much for the convenience of the lodge as for that of the insured. If the supreme lodge intrusted Chadwick with a certain authority, it stands in no position to deny that he was its agent within the scope of that authority. The reports are by no means barren of cases turning upon the proper construction of this so-called 'agency clause,' under which the defendant seeks to shift its responsibility upon the insured for the neglect of Chadwick to remit on the proper day. In some jurisdictions it is held to be practically void, and of no effect; in others, it is looked upon as a species of wild animal, lying in wait, and ready to spring upon the unwary policy holder; and in all it is eyed with suspicion, and construed with great strictness. We

think it should not be given effect when manifestly contrary to the facts of the case, or opposed to the interests of justice. Wherever the agency clause is inconsistent with the other clauses of the policy conferring power and authority upon the agent, he is treated as the agent of the company, rather than of the policy holder. The object of the clause in most cases is to transfer the responsibility for his acts from the party to whom it properly belongs to one who generally has no knowledge of its existence. It is usually introduced into policies in connection with the application, and for the purpose of making the agent of the company the agent of the party making the application, with respect to the statements therein contained. It was formerly held in New York (*Rohrbach* v. *Germania F. Ins. Co.* 62 N. Y. 47, 20 Am. Rep. 451, and *Alexander* v. *Germania F. Ins. Co.* 66 N. Y. 464, 23 Am. Rep. 76), that, where the insured had contracted that the person who had procured the insurance should be deemed his agent, he must abide by his agreement; and where such person had, through fault or mistake, misstated in the application to the company the declarations of the assured, the latter must suffer for the error or wrong; but in a subsequent case, *Whited* v. *Germania F. Ins. Co.* 76 N. Y. 415, 32 Am. Rep. 330, this doctrine was held to be limited to such acts as the agent performed in connection with the original application, and that in a renewal of the policy such party was treated as the agent of the defendant, for whose acts it was bound; and that it was within his power to make a valid waiver of the conditions of the policy. Said the court in its opinion: 'That he was the agent of the defendant it would be fatuous to deny, were it not for a clause in the policy [the agency clause], upon which the defendant builds. . . . But if the insured is to be now bound as having thus contracted, there must be mutuality in the contract. No man can serve two masters. If the procurer of the insurance is to be deemed the agent of the insured, . . . he may not be taken into the service of the insurer as its agent also; or, if he is so taken, the insurer must be bound by his acts and words, when he stands in its place, and moves and speaks as one having authority from it; and, *pro hac vice*, at least, he does then rightfully put off his agency for the insured, and put on that for the insurer. . . . Nor will it hold the plaintiff so strictly to the contract he made as to permit the defendant to ignore it, and take his agent as its agent, and yet make him suffer for all the shortcomings of that person while acting between them, and while under authority from the defendant to act for it.' So, in *Sprague* v. *Holland Purchase Ins. Co.* 69 N. Y. 128, the insured signed a blank form of application, which was filled up by the company's agent without any knowledge or dictation of the insured. There were false statements therein, occasioned by the mistake or inadvertence of the agent. The policy contained the agency clause, as well as the condition that the application must be made out by the defendant's authorized agent; and it was held, using the language of the court in the *Whited Case*, that the latter clause 'swallowed down' the former, and that there was no warranty binding upon the plaintiff. In *Patridge* v. *Commercial F. Ins. Co.* 17 Hun. 95, it was said of the agency clause: 'This is a provision which deserves the condemnation of courts whenever it is relied upon to work out a fraud, as it is in this case. The policy might as well say that the president of the company should be deemed the agent of the assured. . . . Such a clause is no part of a contract. It is an attempt to reverse the law of agency, and to declare that a party is not bound by his agent's acts. Whether one is an agent of another is a question of mixed law and fact, depending on the authority given expressly or impliedly. When a contract is, in fact, made through the agent of a party, the acts of that agent in that respect are binding on his principal.' In *Nassauer* v. *Susquehanna Mut. F. Ins. Co.* 109 Pa. 509, under a by-law providing that 'in all cases the person forwarding applications shall be deemed the agent of the applicant,' it was held, under the circumstances of the case, that the agent of the company soliciting insurance was not the agent of the applicant, and that such by-law was not binding upon him. Although the insured is supposed to know at his peril the conditions of the policy, that will not bind him to a provision which is not true, and one which the company had no right to insert therein. 'We do not assent,' said the court, 'to the proposition that the offer' (that the agent made his own valuation of the property) 'was incompetent, because Laubach was the agent of the assured in filling up the application and forwarding it to the company. He was not the agent of the assured. The latter had not employed him for any purpose. He was the agent of the defendant company, and as such called upon the assured and solicited a policy, and, having obtained his consent, proceeded to fill up the application for him to sign. As to all these preliminary matters the person soliciting the insurance is the agent of the company.' The court, speaking of the agency clause, observed: 'This court in the case above cited, *Columbia Ins. Co.* v. *Cooper*, 50 Pa. 331, characterized a somewhat similar provision as a "cunning condition." The court might have gone further, and designated it as a dishonest condition. It was the assertion of a falsehood, and an attempt to put that falsehood into the mouth of the assured. It formed no part of the contract of insurance. That contract consists of the application and the policy issued in pursuance thereof. In point of fact, the assured does not see the policy until after it is executed and delivered to him. In many instances it is laid away by him, and never read, especially as to the elaborate conditions in fine print. Grant that it is his duty to read it, his neglect to do so can bind him only for what the company had a right to insert therein. He was not bound

to suppose that the company would falsely assert, either by direct language in the policy or by reference to a by-law, that a man was his agent who had never been his agent, but who was, on the contrary, the agent of the company. Notwithstanding this was a mutual company, the assured did not become a member thereof until after the insurance was effected. Hence a by-law of the company, of which he had no knowledge, and by which he was bound, could not affect him in matters occurring before the granting of the policy. And even a by-law of a mutual company, which declares that black is white, does not necessarily make it so.' Similar cases are those of *Eilenberger* v. *Protective Mut. F. Ins. Co.* 89 Pa. 464; *Susquehanna Mut. F. Ins. Co.* v. *Cusick*, 109 Pa. 157; and *Kister* v. *Lebanon Mut. Ins. Co.* 128 Pa. 553, 5 L. R. A. 646, 18 Atl. 447. The case of *Lycoming F. Ins. Co.* v. *Ward*, 90 Ill. 545, resembles the case under consideration. In that case it was held that, where the assured contracts with one as the agent of the insurer, believing him to be such, and does not employ such supposed agent to act for him in obtaining insurance, such person has no power to act for or bind the insured, though the policy may provide that the person procuring the insurance shall be deemed the agent of the insured, and not of the company. Plaintiff paid the premium to the person with whom she contracted for the insurance, and of whom she obtained the policy. It was held that, such person assuming to be the agent of the company, the payment was binding upon the company, whether he paid the money over or not. In that case the person to whom the money was paid was not in reality an agent of the company, although plaintiff believed him to be such, but only a street insurance broker, who represented himself to be the agent of the company. Said the court: 'Under such circumstances, who should bear the loss arising from the fraud committed by the street broker? Should it fall upon the plaintiff, who was an innocent party in the transaction, or should it fall upon the company, who alone enabled Puschman to successfully consummate the contract of insurance by placing in his hands the policy for delivery? The street broker was not the agent of the plaintiff for any purpose. If the evidence be true, he had no authority to act for her, or bind her in any manner whatever, by what he might do in the premises; and while he may not have been, in fact, the agent of the company, still the company, by placing the policy in the hands of the street broker for delivery, is estopped from claiming that the payment made to him upon delivery of the policy is not binding upon the company.' In Indiana it is also held that a recital in the policy that the broker obtaining an insurance is the agent of the insured is not conclusive upon that subject. *Indiana Ins. Co.* v. *Hartwell*, 100 Ind. 566. In *North British & M. Ins. Co.* v. *Crutchfield*, 108 Ind. 518, 9 N. E. 458, the agency clause was held to be absolutely void as applied to a local agent upon whose counter signature the validity of the policy, by its terms, was made to depend. In *Boetcher* v. *Hawkeye Ins. Co.* 47 Iowa, 253, it was held that, if the assured had the right to believe the soliciting agent was the agent of the company, the insertion of a clause in the policy providing that he was the agent of the assured constituted a fraud upon the latter, of which the company could not take advantage. Speaking of the agency clause in *Continental Ins. Co.* v. *Pearce*, 39 Kan. 396, 18 Pac. 291, it said: 'This is but a form of words to attempt to create on paper an agency which in fact never existed. It is an attempt of the company not to restrict the powers of its own agent, but an effort to do away with that relation altogether by mere words, and to make him in the same manner the agent of the assured, when, in fact, such relation never existed. We do not believe the entire nature and order of this well-established relation can be so completely subverted by this ingenious device of words. The real fact as it existed cannot be hidden in this manner; much less can it be destroyed, and something that did not in reality exist be placed in its stead. The substance is superior to the mere drapery of words with which one party wishes to bring into existence and clothe an unreal authority.' See also *Kausal* v. *Minnesota Farmer's Mut. F. Ins. Asso.* 31 Minn. 17, 16 N. W. 430, in which the act of an insurance agent in making out an incorrect application was held chargeable to the insurer, and not to the insured, notwithstanding the insertion of an agency clause in the policy. In *Planters' Ins. Co.* v. *Myers*, 55 Miss. 479, 30 Am. Rep. 521, an agency clause in a policy of insurance was held to be void, as involving a legal contradiction. The applicant made truthful answers to certain interrogatories propounded by the agent, who stated certain things that were not true. They were held not to be binding upon the insured. Speaking of the agency clause, it is said: 'The verbiage of this condition is not candid. It seems to have been used with studied design to obscure the real purpose. It is a snare, set in an obscure place, well calculated to escape notice. It is not written or printed on the face of the policy. It is not so much as alluded to in the application; nor is the agent in his printed instructions enjoined to inform those with whom he treats of it. . . . Its inevitable effect is to greatly weaken the indemnity on which the assured relied. It is inconsistent with the acts and conduct of the insurance companies in sending abroad all over the land their agents and representatives to canvass for risks. It is an effort by covenant to get the benefits and profits which these agents bring them, and at the same time repudiate the relation they sustain to them, and to set up that relationship with the assured, and that, too, without their knowledge and consent. It is not a limitation or restriction of power, but the dissolution of the relationship with themselves and the establishment of it between other parties.' The case of *Schunck* v.

Gegenseitiger Wittwen und Waisen Fond, 44 Wis. 369, is almost precisely like the instant case. The constitution of the defendant corporation, whose governing body or directory was elected by the several 'groves' (corresponding to the sections in this case) of the United Ancient Order of Druids, declared that every member whose assessment was not paid by his grove to the directory within thirty days after demand made forfeited his claim to have a certain sum in the nature of life insurance paid to his widow or heirs after his death. It was held that, in view of all the provisions of such constitution, the benevolent object of the corporation, and the fact that the several groves are at least as much its agents to collect and pay over the dues of their members as they are agents of the latter, in case of a member whose dues have been fully paid to his grove at the time of his death the amount of insurance might be recovered, notwithstanding a default of the grove in paying over such dues to the defendant. The agency clause was also once before this court in the case of *Grace* v. *American Cent. Ins. Co.* 109 U. S. 278, 27 L. ed. 932, 3 Sup. Ct. Rep. 207, in which a clause in the policy that the person *procuring the insurance to be taken* should be deemed the agent of the assured, and not of the company, was held to import nothing more than that the person obtaining the insurance was to be deemed the agent of the insured in the matters immediately connected with the procurement of the policy, and that, where his employment did not extend beyond the procurement of the insurance, his agency ceased upon the execution of the policy, and subsequent notice to him of its termination by the company was not notice to the insured. In the following cases the officers of the subordinate lodge or conclave were treated as the agents of the supreme conclave in the matter of granting extensions of time for the payment of assessments: *Whiteside* v. *Supreme Conclave I. O. of H.* 82 Fed. Rep. 275; *Knights of Pythias of the World* v. *Bridges*, 15 Tex. Civ. App. 196, 39 S. W. 333. . . . The decisive consideration is this: Chadwick was the agent of the defendant, and of the defendant only, after the receipt of the money from Withers. Under section 10 he then became responsible for it to the board of control. In rendering his monthly accounts and paying over the money he acted solely for the defendant. From the time he paid the money to Chadwick the insured had no control over him, and was not interested in its disposition. Unless we are to hold the insured responsible for a default of this agent, which he could not possibly prevent, we are bound to say that his payment to this agent discharged his full obligation to the defendant. That it should have the power of declaring that the default of Chadwick by so much as one day (and it did not exceed four days in this case) to pay over this money should cause a forfeiture of every certificate within his jurisdiction is a practical injustice too gross to be tolerated. Without indorsing everything that is said in the cases above cited, we should be running counter to an overwhelming weight of authority were we to hold that the agency clause should be given full effect, regardless of other clauses in the certificate or the by-laws indicative of an intention to make the officers of subordinate lodges agents of the supreme or central authority. We should rather seek to avoid, as far as possible, any injustice arising from a too literal interpretation, and only give the clause such effect as is consistent with the other by-laws, and with the manifest equities of the case. We are therefore of opinion that in this case the secretary of the section was in reality the agent of the supreme lodge from the time he received the monthly payments, and that the insured was not responsible for his failure to remit immediately after the tenth of the month."

Reversed, and decree here for appellant.

50 L. R. A.

STATE of Mississippi *ex rel.* H. C. McLAUREN, *Appt.*,
v.
A. McDANIEL *et al.*

(.....Miss.....)

The sureties on the official bond of a mayor are liable for his act in causing a person's arrest without a warrant, and trying, convicting, and sentencing him for an offense not made punishable by the ordinances of the city under authority of which he claimed to act.

(May 7, 1900.)

APPEAL by relator from a judgment of the Circuit Court for Jones County in favor of defendants in an action brought to recover damages for false imprisonment. *Reversed.*

Statement by **Whitfield**, Ch. J.:

This is a suit for damages for false imprisonment by appellant, plaintiff below, against A. McDaniel, mayor of the village of Sandersville, Mississippi, and others of the defendants in the lower court, appellees here, as sureties on the bond of said McDaniel. The declaration alleges that in May, 1897, A. McDaniel was appointed, by the governor, mayor of the village of Sandersville, and qualified as such by taking the oath of office as required by law, and by giving bond, with other of the appellees as sureties; that in the month of October, 1897, while said McDaniel was still mayor of said village of Sandersville, he caused the marshal of said village to arrest and take into his custody the usee herein, H. C. McLauren; that said arrest was not made on any war-

NOTE.—As to liability of sureties on official bond for unauthorized acts done *colore officii*, see McLendon v. State use of Kennedy (Tenn.) 21 L. R. A. 738, and *note*: State use of Cocking v. Wade (Md.) 40 L. R. A. 628; State use of Wilson v. Fowler (Md.) 42 L. R. A. 849; and Clayton v. Henderson (Ky.) 44 L. R. A. 474.

rant or writ, and without any affidavit or charge of any kind filed against said usee, nor was said usee taken in the commission of any offense or crime; that said McDaniel caused said usee to be brought before him, and, without having any affidavit or charge against said usee, and against his will, proceeded to and did impose a fine of $5 against him, without ever having any trial or pretended trial of said usee, for the offense, as said McDaniel claimed, of cruelty to animals; that about four days after said usee was arrested as aforesaid said McDaniel issued an illegal mittimus, not founded on any judgment of conviction, but on the pretended illegal proceedings, caused the said marshal to arrest the usee, and to imprison him in the village prison, and there kept him for several hours until an appeal bond was made; and that he was put to great expense in the matter; and that all the acts of the said McDaniel were wilful and malicious, there being no ordinance of the said village of Sandersville under which said usee could have been tried for cruelty to animals. The defendants demurred to the declaration of plaintiff, assigning the following causes for demurrer: (1) Because the bond sued on in this cause was a voluntary bond, and not required by law to be executed; (2) because the declaration shows no cause of action against defendants; (3) because the declaration is insufficient in law. On the trial of the cause the demurrer was sustained, and plaintiff's suit dismissed, and this appeal was prosecuted.

Messrs. **Hartfield & McLauren** for appellant.

Messrs. **Hardy & Howell,** for appellees:

Without complaint or information being made by anyone the conviction was utterly null and void.

McDaniel's acts were not those of a judge, but of a mere trespasser.

Bigham v. *State*, 59 Miss. 529; *Wilcox* v. *Williamson*, 61 Miss. 310.

The sureties on an officer's bond are not liable for his wrongful acts under void process, or no process at all.

McLendon v. *State*, 92 Tenn. 520, 21 L. R. A. 738, 22 S. W. 200; *State use of Cocking* v. *Wade*, 87 Md. 529, 40 L. R. A. 628, 40 Atl. 104.

An officer is not liable in an action on his official bond in the name of the state, for his acts done under void process, or no process at all.

McLendon v. *State*, 92 Tenn. 520, 21 L. R. A. 738, 22 S. W. 200.

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

On the authority of *Bigham* v. *State*, 59 Miss. 529, and *Wilcox* v. *Williamson*, 61 Miss. 310, the appellee McDaniel must be held liable. In *Grove* v. *Van Duyn*, 44 N. J. L. 654, 43 Am. Rep. 412, given at length in 42 Am. Rep. 648–650, note, Chief Justice Beasley, speaking for the court, while declaring that "the jurisdictional test as the measure of judicial responsibility should be rejected," yet said that the magistrate would be liable on another ground in a case like this; saying (p. 650): "It would be no legal answer for the magistrate to assert that he had a general cognizance over criminal offenses, for the conclusive reply would be that the particular case was not, by any form of proceeding, put under his authority." What the magistrate does *colore officii*, his sureties are liable for. They are not liable, by the terms of their bond, for independent wrongs committed by the magistrate acting wholly as an individual, and not at all *colore officii*. The acts of this magistrate here in question were done *colore officii*, and not at all as an individual. He was not acting nor purporting to act in any mere individual capacity, as any private citizen would be. He expressly claimed to be acting as mayor, in the exercise of official authority as such: and it is plain that this is the true character of his acts. His action was in excess of his jurisdiction, or, at all events, he had no authority to try that particular case except in the manner required by law; but, nevertheless, what he did was done *colore officii*, and his sureties are liable. We approve the reasoning in the cases of *Clancy* v. *Kenworthy*, 74 Iowa, 740, 35 N. W. 427, and *Turner* v. *Sisson*, 137 Mass. 191, cited in the *note* to *McLendon* v. *State use of Kennedy* (Tenn.) 21 L. R. A. 738. Says the court in 74 Iowa, at page 743, 35 N. W., at page 428: "But it is insisted that, as the constable is shown to have had no lawful authority to arrest plaintiff, his act was, therefore, not done in the line of his duty. In truth his act was in the line—direction—of official duty, but was illegal, because it was in excess of his duty. In the discharge of official functions he violated his duty, and oppressed the plaintiff. This is all there is of it. If, in exercising the functions of his office, defendant is not liable for acts because they are illegal or forbidden by law, and for that reason are trespasses or wrongs, he cannot be held liable on the bond at all, for the reason that all violations of duty and acts of oppression result in trespasses or wrongs. For lawful acts in discharge of his duty he, of course, is not liable. It follows that, if defendant's position be sound, no action can be maintained upon the bond in any case." Say the court in 137 Mass. 191, 192: "By an official act is not meant a lawful act of the officer in the service of process; if so, the sureties would never be responsible. It means any act done by the officer in his official capacity, under color and by virtue of his office." See also *State ex rel. Conley* v. *Flinn*, 3 Blackf. 72, 23 Am. Dec. 389, and especially *Brown* v. *Weaver*, 76 Miss. 7, 42 L. R. A. 423, 23 So. 388, as reported in 71 Am. St. Rep. 512, and the note thereto. We think the sureties are liable. Murfree, Sheriffs, § 60.

Judgment is reversed, demurrer overruled, and cause remanded.

MASSACHUSETTS SUPREME JUDICIAL COURT.

Frederick A. CLAPP, *Appt.*,
v.
Aaron O. WILDER *et al.*

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

1. **An express condition in a deed** that the grantee, his heirs and assigns, shall never erect any building nearer the street than a building then standing thereon creates a conditional fee, with the right of reverter in the grantor, his heirs or devisees.
2. **A merely personal right, and not an easement appurtenant,** was created by an express condition in a deed that the grantee, his heirs and assigns, should never erect a building nearer the street than the one then standing, where the grantor, who then occupied adjoining premises as a homestead, was an invalid, who usually sat at a window from which he had a good view of the street, and he had declared during the negotiations that he did not wish his view of the street from that window cut off, and should have a clause in the deed to prevent it.

(*Morton, Knowlton, and Lathrop, JJ., dissent.*)

(June 20, 1900.)

APPEAL by plaintiff from a decree of the Superior Court for Worcester County in favor of defendants in an action brought to enjoin the erection of a building in violation of a covenant in the title deeds. *Affirmed.*

The facts are stated in the opinion.

Mr. **Charles A. Babbitt,** for appellant:

The condition in the deed of Eaton to defendants is a restriction in the nature of a servitude, the benefit of which would attach to the adjoining estate, and pass with it as an appurtenance.

Whitney v. *Union R. Co.* 11 Gray, 359, 71 Am. Dec. 715; *Jeffries* v. *Jeffries*, 117 Mass. 188; *Adams* v. *Valentine*, 33 Fed. Rep. 1; *Parker* v. *Nightingale*, 6 Allen, 341, 83 Am. Dec. 632.

The words "and this conveyance is made upon the express condition," in defendant's deed, are sufficient to create a condition the breach of which would forfeit the estate, unless it appears from the whole deed the intention was not so to do.

Episcopal City Mission v. *Appleton*, 117 Mass. 329; *Skinner* v. *Shepard*, 130 Mass. 180.

The intention was "to reserve forever to his heirs and assigns," as the condition states, the right of light and prospect to the adjoining lot.

Lowell Inst. for Savings v. *Lowell*, 153 Mass. 533, 27 N. E. 518; *Peck* v. *Conway*, 119 Mass. 546; *Dennis* v. *Wilson*, 107 Mass. 592.

"When, therefore, it appears, by a fair interpretation of the words of a grant, that it was the intent of the parties to create or reserve a right in the nature of a servitude or easement in the property granted, for the benefit of other land owned by the grantor, and originally forming, with the land conveyed, one parcel, such right will be deemed appurtenant to the land of the grantor, and binding on that conveyed to the grantee; and the right and burden thus created will respectively pass to, and be binding on, all subsequent grantees of the respective lots,"—is the well-settled law of this state.

Whitney v. *Union R. Co.* 11 Gray, 359, 71 Am. Dec. 715; *Beals* v. *Case*, 138 Mass. 140.

The owner of adjacent lots may insist upon a condition when it is apparent that the condition was annexed to a grant for the purpose of rendering more beneficial and advantageous the use of the adjoining estate.

Jewell v. *Lee*, 14 Allen, 145, 92 Am. Dec. 744; *Badger* v. *Boardman*, 16 Gray, 559.

The value of the granted lot will be increased if defendants should get rid of the condition, which was a material part of the title they purchased and accepted, and they would acquire a larger title than their deed gave them, and the plaintiff would have less than he had a right to suppose, having had notice of the condition.

Dorr v. *Harrahan*, 101 Mass. 534.

The retained land has been built upon. In place of the dwelling house is a large block, with large windows that would be of little value if the condition was not complied with. These acts of the parties tend to show that all parties considered the condition as a restriction.

Ayling v. *Kramer*, 133 Mass. 13; *Keening* v. *Ayling*, 126 Mass. 404.

If, in view of these facts, equity cannot be done by a perpetual injunction, the plaintiff should be equitably entitled to substantial damages.

Jackson v. *Stevenson*, 156 Mass. 496, 31 N. E. 691.

The condition in Eaton's deed to defendants—"this conveyance is made upon the express condition," etc.—certainly creates a reservation equally as strong as the words, "with the express reservation."

Peck v. *Conway*, 119 Mass. 546.

Mr. **Hamilton Mayo,** for appellees:

A restriction in the form of a common-law condition may be enforced by forfeiture if there is nothing in the context of the deed which warrants any other than the ordinary meaning of the technical words of condition employed, and nothing in the attending circumstances showing the parties did not intend that the words employed should have their ordinary meaning.

Gray v. *Blanchard*, 8 Pick. 284.

Where the terms of the instrument are plain and unambiguous there is no hesitation in enforcing the actual contract made by the parties.

Jones, Real Prop. chap. 743.

The cases where "conditions," so called, are held to have been intended as restrictions

NOTE.—For easements appurtenant, see *note* to Hagerty v. Lee (N. J. L.) 20 L. R. A., on page 635; also Peabody Heights Co. v. Willson (Md.) 36 L. R. A. 393.

as to the use of land or its enjoyment are cases where there was a general scheme of improvement.

Ayling v. *Kramer*, 133 Mass. 12; *Parker* v. *Nightingale*, 6 Allen, 341, 83 Am. Dec. 632; *Jeffries* v. *Jeffries*, 117 Mass. 184; *Hamlen* v. *Werner*, 144 Mass. 396, 11 N. E. 684.

If this clause is a condition, this bill cannot be maintained, for a failure to perform a condition can only be taken advantage of by entry for forfeiture by the grantor or his heirs, or suit for recovery of possession.

Dana v. *Wentworth*, 111 Mass. 291.

This condition will be regarded as personal unless an intention to the contrary appears or may be presumed.

Badger v. *Boardman*, 16 Gray, 559; *Jewell* v. *Lee*, 14 Allen, 145, 92 Am. Dec. 744; *Sharp* v. *Ropes*, 110 Mass. 381; *Beals* v. *Case*, 138 Mass. 138; *Lowell Inst. for Savings* v. *Lowell*, 153 Mass. 530, 27 N. E. 518.

It is always a question of the intent of the parties, and in order to make the rule applicable it must appear from the terms of the grant, or the situation and surrounding circumstances, that it was the intention of the grantor to create a servitude or right which should inure to the plaintiff's land, and should be annexed to it as an appurtenance.

Badger v. *Boardman*, 16 Gray, 559; *Jewell* v. *Lee*, 14 Allen, 145, 92 Am. Dec. 744; *Beals* v. *Case*, 138 Mass. 140; *Sharp* v. *Ropes*, 110 Mass. 381.

And the burden of proof is on the plaintiff to show such intention.

Lowell Inst. for Savings v. *Lowell*, 153 Mass. 530, 27 N. E. 518; *Beals* v. *Case*, 138 Mass. 138.

For aught that appears in the deed, the condition might have been intended for the benefit of the grantor only so long as he remained the owner of the remaining land.

Badger v. *Boardman*, 16 Gray, 559.

In the absence of any words to the effect that the condition was intended to benefit Eaton's other land, or any reference to a plan showing a general scheme of improvement, the defendants took their estate without any notice, express or constructive, that the restriction was intended for the benefit of the adjoining estate.

Skinner v. *Shepard*, 130 Mass. 180.

When the intention of a person is relevant, that intent may be shown by his declarations at the time of the acts. They are part of the *res gestæ;* they accompany the act, the nature, object, or motive of which is the proper subject of inquiry.

1 Greenl. Ev. § 101, and notes; *Scott* v. *Berkshire County Sav. Bank*, 140 Mass. 157, 2 N. E. 925.

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

This case turns upon the legal force and effect of this clause in the deed from Eaton to the defendants, namely: "And this conveyance is made upon the express condition that said Wilder and Hills, their heirs and assigns, shall never erect any building nearer the street than the store building thereon." The first question is whether this is a common-law condition. The deed is in the ordinary form of a warranty deed in general use in this commonwealth, is carefully drawn, and bears upon its face evidence that the draftsman understood the meaning of the legal terms used. It conveys in apt language the land now owned by the defendants, and creates also in express terms two easements, one of which is a right of way over a strip of land 8 feet wide on the grantor's land next southerly of and adjoining the land conveyed, and the other is the right to maintain a drain from the store building as conveyed to the grantor by a prior deed; and it reserves a right of way over a strip of land upon the southerly side of the land conveyed, making, in connection with the right of way above conveyed to the defendants, a passageway 16 feet wide, to be used in common; and also the right to maintain a certain drain from the cellar of the house where the grantor resides to the cellar under said store building. Up to this point the grantor has used language apt to create easements and reservations. He desires to do one thing more, and that is to prevent the erection of any building within a certain distance of the street. Everything else has been provided for. Here the language changes, and as to this one thing the deed is upon the express condition that this provision be complied with. The language is, "upon the express condition," an emphatic form of the expression "on condition." Whatever may be the force of this language in a will (see *Atty. Gen.* v. *Wax Chandlers' Co.* L. R. 6 H. L. 1; *Bradstreet* v. *Clark*, 21 Pick. 389), there can be no doubt of its usual meaning in a deed. The phrase *sub conditione*, or "on condition," is one of the three phrases by which, without more, a conditional estate may be created. It is the first one named by Littleton, and Coke says of it: "This is the most expresse and proper condition in deed, and therefore our author beginneth with it." 2 Co. Litt. 203 (a); *Rawson* v. *School Dist. No. 5*, 7 Allen, 125, 83 Am. Dec. 670, and authorities cited. In the deed before us it applies to one single thing perfectly plain and simple. The common law as to the creation of conditional estates has always been considered a part of our common law. If we are to have such estates, it is important that there should be the least possible uncertainty as to the form of the language to be used in creating them; and when we find in a deed an intensified form of the phrase, which from the earliest times has been regarded as "the most expresse and proper" phrase by which to create such an estate, it is to be assumed, in the absence of anything appearing in the deed to the contrary, that the phrase is used for its proper legal purpose, namely, to create such an estate, and that such an estate is thereby created. No doubt there is a disposition among courts to look for something in the deed which shall modify the severity of the language; and sometimes considerable astuteness has been exercised in this direction (*Post* v. *Weil*, 115 N. Y. 361, 5 L.

R. A. 422, 22 N. E. 145; and no doubt the language is sometimes used when from the whole deed it sufficiently appears that it could not have been intended in its full technical sense, and in such cases a restriction, and not a technical condition, is the result. Thus, in *Sohier* v. *Trinity Church*, 109 Mass. 1, 19, the expression "in trust nevertheless, and upon condition always," was held not to create a condition, because "the grantors were merely a committee who had taken their title in trust for the society, and, if it were to come back to their heirs by forfeiture, it must be held by them in trust for the society, and thus would merely be turned into a trust estate." In *Episcopal City Mission* v. *Appleton*, 117 Mass. 326, the words "upon and subject to the condition" preceded one paragraph, and the words "and also upon the further condition" preceded the next paragraph, and they were held not to create conditions. As stated by the court, there was no reason for giving to the first phrase any different meaning than that given to the other; and both clauses could not be construed as conditions, because "upon that construction a breach of the first would, upon entry by the grantor or his heirs, forfeit the whole estate, and leave nothing in the grantee to which the last part of the second clause could apply." The second clause could "therefore have effect only by way of restriction, and the first clause must have a like interpretation and effect." So, also, where a conveyance is subject to several conditions of varying importance regulating the mode in which the grantee may use and enjoy the land, and it appears that they are imposed as a part of the general scheme of improvement, and therefore enforceable in equity by the owners of the estates for whose benefit they were imposed, they may be considered restrictions, especially if one of them be of such a nature as to be regarded as a personal stipulation. *Skinner* v. *Shepard*, 130 Mass. 180; *Ayling* v. *Kramer*, 133 Mass. 12. So, also, a deed reciting that the premises are conveyed subject to a condition contained in a prior deed, and reciting the condition, may be construed, not as reimposing the condition by the grantor, but as conveying the title the grantor had received from his predecessor. Nor is the case of *Cassidy* v. *Mason*, 171 Mass. 507, 50 N. E. 1027, to be understood as extending this doctrine further than as stated in these two paragraphs. *Ayling* v. *Kramer*, 133 Mass. 12. See *Locke* v. *Hale*, 165 Mass. 20, 42 N. E. 331. The case at bar does not come within any exception to the general rule as to the legal meaning of the phrase "upon the express condition." As stated by Parkes, Ch. J., in *Gray* v. *Blanchard*, 8 Pick. 284, 288: "The words 'this conveyance is upon the condition' can mean nothing more or less than their natural import. . . . It would be quite as well to say that the words mean nothing, and so ought to be rejected altogether." It must be held, therefore, that the deed from Eaton to the defendants conveyed a conditional fee, and that the right of reverter, remaining in the grantor up to the time of his death, went to his heirs or devisees. *Gray* v. *Blanchard*, 8 Pick. 284, 288; *Allen* v. *Howe*, 105 Mass. 241; *Guild* v. *Richards*, 16 Gray, 322; *Hayden* v. *Stoughton*, 5 Pick. 528; *Austin* v. *Cambridgeport*, 21 Pick. 215; Pub. Stat. chap. 127, § 1.

The next question is whether this condition was imposed for the benefit of the land now held by the plaintiff. If it was, then it is immaterial whether it be in the form of a condition or restriction, so far as respects the right of this plaintiff. *Whitney* v. *Union R. Co.* 11 Gray, 359, 71 Am. Dec. 715; *Hopkins* v. *Smith*, 162 Mass. 444, 38 N. E. 1122, and cases therein cited. Upon this question the case comes to us in a singular way, and it is somewhat difficult to understand the terms of the report. Upon the record before us there is an agreed statement of facts, and it would seem that the case was submitted to the superior court upon that. The trial judge ruled that the clause in dispute is a restriction, then "found from the terms of the deed and surrounding circumstances and situation that it was not intended by the grantor to create a servitude for the benefit of plaintiff's land," and then, by consent of counsel, reported the case to this court upon the bill, answer, agreed facts, and his "findings." If his so-called "finding" is to be regarded as a finding of fact, and that finding is to stand, then there is no case for the plaintiff. The parties, however, have treated the matter as, in substance, a ruling in law, and we therefore assume it was intended as such, and that the case is before us upon the bill, answer, and agreed facts. The burden is upon the plaintiff to show that the condition in the deed to the defendants created a servitude or right in the nature of an easement; which, by implication, is made appurtenant to his land. The rule is stated in *Whitney* v. *Union R. Co.* 11 Gray, 359, 71 Am. Dec. 715, to be that, when "it appears by a fair interpretation of the words of a grant that it was the intent of the parties to create or reserve a right in the nature of a servitude or easement in the property granted for the benefit of other land owned by the grantor, and originally forming, with the land conveyed, one parcel, such right will be deemed appurtenant to the land of the grantor, and binding on that conveyed to the grantee: and the right and burden thus created will respectively pass to and be binding on all subsequent grantees of the respective lots of land." But whether the condition was intended to create merely a personal right or an easement appurtenant to some other land is always a question of intent. As stated in *Beals* v. *Case*, 138 Mass. 138: "It is always a question of the intention of the parties; and, in order to make this rule applicable, it must appear from the terms of the grant or from the situation and surrounding circumstances that it was the intention of the grantor in inserting the restriction [condition] to create a servitude or right which should inure to the benefit of the plaintiff's land, and should be annexed

to it as an appurtenance." There is no language in the deed expressly stating that this condition was inserted for the benefit of the remaining land. It would have been easy to say that it was so inserted if that had been the intention of the grantor. This omission is rendered more significant when it is observed that the right of way which is reserved in the deed is "to be used in common by the owners of the estate on either side thereof," thereby showing that when the grantor intended to make a reservation for the benefit of his remaining lot he appreciated the importance of making that intention clear, and knew how to do it. We must therefore look into the situation and attendant circumstances. It is not a case where the owner of land adopts a scheme or plan for its improvement, dividing it into house lots, and inserting in the various deeds uniform restrictions as to the purposes for which the land may be used, such restrictions upon each being intended for the benefit of the other lots, and is therefore not included in the class of cases of which *Whitney* v. *Union R. Co.* 11 Gray, 359, 71 Am. Dec. 715, and *Hopkins* v. *Smith*, 162 Mass. 444, 38 N. E. 1122, are examples. And the case is still further distinguishable from many of these cases by the fact that in them there is express language in the deeds showing an intention to create the easement for the benefit of other land. And the case is unlike *Peck* v. *Conway*, 119 Mass. 546. In that case there was a reservation, and not a condition, and the grantor could have no interest in the reservation other than as connected with his remaining land. In this present case the grantor retained an interest in the land sold to the defendants, and after the sale of the remaining land the right of reverter in the defendant's land still remained in his heirs or devisees. It appears that the grantor was an invalid, and that he usually sat at a window, from which he had a good view of the street; and that while negotiations were pending between him and the defendants, and prior to the delivery of the deed, he told them that if he sold the property to them he did not wish his view of the street from that window cut off, and he should have some clause inserted in the deed to prevent this; and when the deed was delivered he told the defendants he had put in a clause so that his view of the street from the window should not be cut off. He was sick, and desired to have the view from the window remain unimpaired so long as he should live where he then lived. He was looking out for his personal comfort while in occupancy of the house, but that purpose is perfectly consistent with the view that he was not making any provision for the future occupant. It may be admitted that it would be for the benefit of the plaintiff's land to have the condition observed, but the real question is, Was it the intention of the grantor that the right to have it thus observed should be an appurtenance to that land? On this question we may properly take into consideration the manner in which he protected himself. In the case of a restriction or reservation the person who creates the restriction stands as a rule, absolutely indifferent to its observance, except as he may be interested as owner of some adjoining land. But it is otherwise in the case of a condition. The owner of the right of reverter has an interest in the land conditioned entirely independent of the benefit of other land owned by him or any other person. It is a right personal to him and his heirs or devisees. Indeed, in ancient times conditions were, as a rule, of such a nature that their observance or violation was of no benefit or damage whatever to any other land than that upon which the condition was imposed, and the only persons interested were the owners of the defeasible estate on the one hand and the owner of the right of reverter on the other. See note 84 Butl. Co. Litt. 201(a). In this very case the owner of the right of reverter could, in any event, enter for breach of condition, and hold the land free from condition as of his original estate as against the whole world, unless, indeed, an exception be made in favor of the plaintiff. The only circumstances here relied upon as showing that the grantor intended to create this conditional estate for the benefit of his remaining land is that he was occupying it as a homestead at the time of the grant, and that it would be benefited by the observance of the condition. But these facts are just as consistent with the idea that the grantor intended that this remaining land should have the benefit of the condition only so long as he pleased, whether occupied by him or not, and that at all times the right of reverter should remain unimpaired in him or his heirs. Upon full consideration of this whole deed in the light of the attendant circumstances, we think that the plaintiff has failed to show that this condition was created for the benefit of the plaintiff's land. We are aware that in other states there have been decisions that may seem to be, and perhaps are, in conflict with this decision, although we are inclined to think that upon full examination the difference may be more seeming than real, and that the difference of result arises rather from a difference in the facts than from any difference as to well-recognized legal or equitable principles. See *Clark* v. *Martin*, 49 Pa. 289; *Watrous* v. *Allen*, 57 Mich. 362, 58 Am. Rep. 363, 24 N. W. 104; *Post* v. *Weil*, 115 N. Y. 361, 5 L. R. A. 422, 22 N. E. 145. But, however that may be, we think a decision for the plaintiff on the facts of this case would be extending the doctrine of *Whitney* v. *Union R. Co.* 11 Gray, 359, 71 Am. Dec. 715, and of similar cases in this commonwealth, beyond its legitimate scope, and much further than it ought to go. The case is rather to be classed with such cases as *Badger* v. *Boardman*, 16 Gray, 559; *Jewell* v. *Lee*, 14 Allen, 145, 92 Am. Dec. 744; *Sharp* v. *Ropes*, 110 Mass. 381; *Dana* v. *Wentworth*, 111 Mass. 291. It seems to us that in all these cases it is better to get at the intention of the grantor from the language of the deed interpreted in the light of the attending circumstances than to conjecture the intent from the circumstances, and then to make the lan-

guage of the deed bend to that. The declarations of Eaton after the delivery of the deed were properly excluded.

Bill dismissed.

Morton, J., dissenting:

There is no doubt that there are words in the clause in question express and apt to create a condition at common law, and that estates upon condition are a well-known form of estate. But that does not assist us much in the construction of the clause. There never has been any hard and fast rule that words express and apt to create a condition at common law in a deed should always be so construed. From the time of Lord Coke, if not before, such words have received a different construction when required in order to promote the obvious intent and purpose of the parties. Co. Litt. 203; *Cromwell's Case*, 2 Coke, 70; Shep. Touch. 122; 2 Bl. Com. Sharswood's ed. § 151, note 1. The converse has been equally true. Words not apt to create a condition in a deed at common law have been construed as creating one when such appeared to be the intention of the parties, and the language admitted of such a construction. Shep. Touch. 123. Neither does the law look with especial favor upon estates on condition. "Conditions subsequent," it is said by Chancellor Kent, "are not favored in law." 4 Kent, Com. 9th ed. § 129. They are strictly construed against parties seeking to enforce them, and equity affords relief in various cases from forfeiture for a breach of them. *Bradstreet* v. *Clark*, 21 Pick. 389; *Merrifield* v. *Cobleigh*, 4 Cush. 178; *Lundin* v. *Schoeffel*, 167 Mass. 465, 470, 45 N. E. 933, and cases cited; *Lilley* v. *Fifty Associates*, 101 Mass. 432. These doctrines have been long and well settled. And they have led this court and other courts frequently to construe so-called "conditions" not according to the strict meaning of the words used, but in such a manner as to carry out the intentions of the parties as manifested by a fair interpretation of the language when viewed in the light of the attendant circumstances. If it appeared that the parties intended to create an estate upon condition, effect has been given to the intention. If it appeared that some other right or obligation was intended to be created, the language has been construed accordingly. The matter has been regarded as one of substance, rather than of form; and the cardinal rule of construction has been, not to ascertain the effect in regard to estates upon condition, but to ascertain and enforce the intention of the parties so far as it could be done consistently with established rules. In numerous cases, for one reason or another, words apt to create a condition at common law in a deed have been interpreted as meaning something else,—limitations, covenants, restrictions, easements, servitudes, and trusts,—because it was thought that such a construction would best conform to and carry out the intention of the parties. *Cassidy* v. *Mason*, 171 Mass. 507, 50 N. E. 1027; *Hopkins* v. *Smith*, 162 Mass. 444, 38 N. E. 1122; 50 L. R. A. *Ayling* v. *Kramer*, 133 Mass. 12; *Skinner* v. *Shepard*, 130 Mass. 180; *Jeffries* v. *Jeffries*, 117 Mass. 184; *Episcopal City Mission* v. *Appleton*, 117 Mass. 326; *Sohier* v. *Trinity Church*, 109 Mass. 1, 19; *Chapin* v. *Harris*, 8 Allen, 594; *Parker* v. *Nightingale*, 6 Allen, 341, 83 Am. Dec. 632; *Post* v. *Weil*, 115 N. Y. 361, 5 L. R. A. 422, 22 N. E. 145; *Avery* v. *New York C. & H. R. R. Co.* 106 N. Y. 142, 12 N. E. 619; *Clark* v. *Martin*, 49 Pa. 289; *Watrous* v. *Allen*, 57 Mich. 362, 58 Am. Rep. 363, 24 N. W. 104; *Lake Erie & W. R. Co.* v. *Priest*, 131 Ind. 413, 31 N. E. 77; *Wier* v. *Simmons*, 55 Wis. 637, 13 N. W. 873; *Fuller* v. *Arms*, 45 Vt. 400; *Mills* v. *Davison*, 54 N. J. Eq. 659, 35 L. R. A. 113, 35 Atl. 1072; *Neely* v. *Hoskins*, 84 Me. 386, 24 Atl. 882. The decisions in which this has been done have not been confined to any particular class of cases, such as, for instance, building schemes and plans of general improvement; but the rule has been applied in other cases, and has been recognized in cases where it was not applied. It is an application to conditions in deeds of the rule adopted in regard to other written instruments, namely, to so construe them as best to promote to obvious intent and purpose of the parties. *Merrifield* v. *Cobleigh*, 4 Cush. 178. It is the same principle which has led to the construction of a deed intended to take effect *in futuro*, as a covenant to stand seised (*Trafton* v. *Hawes*, 102 Mass. 541, 3 Am. Rep. 494), and is, I think, a sound and sensible rule, and one calculated to do justice between parties. The question, then, is, it seems to me, How shall this clause be construed in the light of adjudged cases in this and other courts, and in the light of the attendant circumstances at the time of the execution of the deed? The latest case in this court in which the construction of a condition in a deed has been considered is *Cassidy* v. *Mason*, 171 Mass. 507, 50 N. E. 1027. There were three deeds, each having a clause that contained language apt to create a condition at common law. In the first deed the language was, "Provided, that no building shall be erected on said lots of land, or either of them, within 10 feet of the streets as exhibited on said plan." In the second it was, "On condition that no building shall ever be erected on said lot within 10 feet of said plan [*sic*] as laid down on said plan." And in the third it was, "The premises are sold subject to the condition that no building shall ever be erected on the granted premises within less than 10 feet from said street." It will be seen that the object of each provision was the same as here, namely, to prevent the erection of buildings within a certain distance of the street, and that words the most apt to create a condition at common law were used, namely, "provided," "on condition," and "subject to the condition." There is nothing in the case as reported or in the papers on file that shows that the provisions were inserted as part of a general scheme or plan of improvement, and the opinion does not purport to go on that ground. All of the justices sitting concurred, so far as appears, in the opinion,

which was written by the late chief justice. It was held that the provisions should be construed as restrictions, and not as conditions. It is not really attempted, as I understand it, to distinguish that case from this. It would seem that the remark of Lord Ellenborough in *Proprietors of Liverpool Waterworks* v. *Atkinson*, 6 East, 507, was applicable: "With a decided case exactly in point, it would be extraordinary if we were to apply a different rule of construction." In *Hopkins* v. *Smith*, 162 Mass. 444, 38 N. E. 1122, the provision that was the subject of consideration was expressed in the form of a condition with what was in effect a clause of forfeiture and reverter, but the court held that it constituted a restriction for the benefit of the purchasers of other lots. This case, with *Cassidy* v. *Mason*, *supra*, illustrates the tendency of this court, and shows the extent to which it has gone in recent decisions in the construction of so-called "conditions." In *Ayling* v. *Kramer*, 133 Mass. 12, a condition that "the front line of the building which may be erected on the said lot shall be placed on a line parallel with and 10 feet back from said Newton street" was held to constitute a restriction. The decision was put on the ground that the condition was imposed as a part of a general scheme of improvement. But conditions are construed as restrictions in such cases, not because courts have any special fondness for or leaning towards building schemes or plans of general improvement, but because it would be inequitable and unjust, as against the owners of adjoining and neighboring estates, to construe them otherwise, and to permit a party taking an estate with notice of a valid agreement respecting its mode of use and occupation towards such estates to avoid it. *Whitney* v. *Union R. Co.* 11 Gray, 359, 71 Am. Dec. 715; *Parker* v. *Nightingale*, 6 Allen, 341, 83 Am. Dec. 632. It is difficult to see why such reasoning does not apply as well between two as between twenty, or why, if it is inequitable and unjust to permit a party to avoid his agreement when there are ten estates to be affected, it is not also inequitable and unjust when there is only one estate to be affected. See also *Jeffries* v. *Jeffries*, 117 Mass. 184, in which the clause, "provided, that the roof of the aforesaid stable shall never be raised more than 13 feet above Olive street," in each of three deeds of three adjacent lots from a common grantor, was held to constitute a restriction on each lot in favor of the other two. In *Skinner* v. *Shepard*, 130 Mass. 180, and *Episcopal City Mission* v. *Appleton*, 117 Mass. 326, there was no building scheme or plan of general improvement. The respective deeds contained building limitations in the form of conditions. They were construed as restrictions, for reasons there given. See also *Parker* v. *Post* v. *Weil*, 115 N. Y. 231, 5 L. R. A. 422, and *Merrifield* v. *Cobleigh*, 4 Cush. 178. In *Post* v. *Weil*, 115 N. Y. 361, 5 L. R. A. 422, 22 N. E. 145, the owners of two adjoining farms conveyed one subject to this provision: "Provided, always, and these presents are upon this express condition, that the aforesaid premises shall not, nor shall any part thereof, . . . be at any time hereafter used or occupied as a tavern or public place of any kind." It was held that the provision constituted a restriction for the benefit of the adjoining property. See also *Avery* v. *New York C. & H. R. R. Co.* 106 N. Y. 142, 12 N. E. 619. In *Clark* v. *Martin*, 49 Pa. 289, the owner of two adjoining lots, who resided on one, conveyed the other "upon this express condition, nevertheless, that the said . . . their heirs or assigns, shall not build or erect, . . . on any part of the hereby granted lot of ground, beyond the distance of 65 feet from the said Eighth street, any buildings whatsoever, other than privies, milk or bathing houses, and walls or fences not exceeding the height of 10 feet from the level of the ground." It was held that it was the duty of the defendant not to build in violation of the condition, and that this duty was reserved to the original grantor, not as a mere personal obligation, but for the benefit of the adjoining land; Chief Justice Lowrie, who wrote the opinion, saying, "Common sense cannot doubt its purpose,"—meaning the purpose of the condition, and that it was to benefit the adjoining land. In *Watrous* v. *Allen*, 57 Mich. 362, 58 Am. Rep. 363, 24 N. W. 104, the deed was upon "the express condition" that if the grantees, their heirs and assigns, should at any time sell or keep for sale spirituous or intoxicating liquors, the title of the premises should thereupon cease and revert to the grantor, his heirs and assigns, and it should be lawful for them to enter and expel the grantees and their heirs and assigns. It appeared that the grantor was the owner of a large amount of real estate in the vicinity of and contiguous to the granted premises, and that the same had been platted; but it did not appear that any of the other lots had been sold, or that, if sales had been made, the deeds contained provisions uniform with that above referred to. It was held that the condition could be enforced in equity as an agreement by one who had succeeded to the title of the original grantor to the adjoining and neighboring land against one who had succeeded to the title of the original grantee. See also *Fuller* v. *Arms*, 45 Vt. 400; *Lake Erie & W. R. Co.* v. *Priest*, 131 Ind. 413, 31 N. E. 77; *Wier* v. *Simmons*, 55 Wis. 637, 13 N. W. 873.

It seems to me that the case of *Cassidy* v. *Mason*, 171 Mass. 507, 50 N. E. 1027, and the other cases to which I have referred, are decisive of this. In the present case, at the time of the conveyance to the defendants, their grantor owned and occupied as a homestead the premises now belonging to the plaintiff, and adjoining on the north those of the defendants. The premises were both situated on the easterly side of Central street, in Leominster. On the premises conveyed to the defendants the only building, so far as appears, was a store two stories high and 22½ feet from the street line. On those retained by the defendants' grantor was the dwelling house occupied by him. This was

considerably nearer the street than the store, and was, as appears from the scale to which the plan is drawn, about 35 feet south of the store. It appears—though I doubt whether it is of importance—that the defendant's grantor was an invalid, and from the window at which he usually sat there was a good view of Central street, which was the main street of Leominster. The defendants have built out to the street line, although they were notified by the plaintiffs not to do so, and though their deed prohibits them from doing so. I lay on one side the declarations of defendants' grantor made before and after and at the time of the execution and delivery of the deed. They do not serve to identify the subject-matter, or to explain the situation of the parties and the attendant circumstances when the deed was executed, and delivered. They are declarations by the grantor respecting his purpose in having the clause inserted, and as such, it seems to me, are clearly inadmissible. *Harlow* v. *Thomas*, 15 Pick. 66; *Noble* v. *Bosworth*, 19 Pick. 314; *Davis* v. *Ball*, 6 Cush. 505, 53 Am. Dec. 53; *Miller* v. *Washburn*, 117 Mass. 371; *Simanovich* v. *Wood*, 145 Mass. 180, 13 N. E. 391; *Lilienthal* v. *Suffolk Brewing Co.* 154 Mass. 185, 12 L. R. A. 821, 28 N. E. 151; *Adams* v. *Morgan*, 150 Mass. 143, 22 N. E. 708; *Sirk* v. *Ela*, 163 Mass. 394, 40 N. E. 183. It is plain that the object of the so-called "condition" was to prevent the defendants from doing what they have done, and to prevent them from doing it at any time, either during the grantor's life or afterwards. The language is, "that said Wilder and Hills, their heirs and assigns, shall never erect any building nearer the street line," etc. The prohibition expressly extends, not only to Wilder and Hills, but to their heirs and assigns,—to all who shall take through them. When Wilder and Hills took their deed, they thereby agreed for themselves and their heirs and assigns that they would never build any nearer the street line than the store then was. The right and obligation thus created were not limited to the lives of the grantor and grantees, and were not temporary in character, but were to continue indefinitely, and were permanent. Which then, is the more reasonable, that they were created for the benefit of the adjoining estate, or for the personal benefit of the grantor? It is possible, perhaps, to think of the grantor as speculating upon possibilities of reverter and rights of re-entry, and as pausing to consider the differences between reservations and conditions, but it is not likely that he did so. It must have been plain to him, as to everyone else, that no one could have as much interest in having the space between the store and the street kept open as the owner and occupant of the adjoining premises, and that his interest would consist in the fact that he was such owner and occupant. This would apply to the grantor as well as to his successors in title. The grantor was not thinking of a personal right or privilege. He was dealing with property and rights of property, not with personal rights. That is shown by what was conveyed, and by the reservations of the rights of way and drainage. It is fair to assume that the scrivener who drew the deed knew that rights could be created for the benefit of an adjoining estate as well in the form of a condition as in the form of a reservation or restriction. To assume otherwise would be to suppose that he was ignorant of numerous cases in which this court has so held, and of long-established rules. The change from the language of reservation to that of condition was not for the purpose of altering the nature of the right, but to express in the strongest terms that the estate which he was conveying should remain subject forever to an easement of light, air, and prospect in favor of the other estate. He does this by making the conveyance upon the express condition that the grantees, their heirs and assigns, should never build nearer the street line than the store then was. The reasoning of the court in *Peck* v. *Conway*, 119 Mass. 546, where the grantor occupied as a homestead a lot adjoining that which he conveyed, seems to me applicable. "It is difficult," says the court, "to see how he [the grantor] would have any interest in restricting the use of the land sold except as owner of the house lot which he retained. The nature of the restriction also implies that it was intended for the benefit of this lot. A prohibition against building on the land sold would be obviously useful and beneficial to this lot, giving it the benefit of better light and air and prospect (this is its apparent purpose); while it would be of no appreciable advantage for any other purpose. The fair inference is that the parties intended to create this easement or servitude for the benefit of the adjoining estate." It is true that in that case the right was created by reservation. But no stress was laid on that fact, and personal rights may be created as well by reservation or restrictions as by conditions. The question was whether the right was a personal right or was appurtenant to the adjoining land, and the court was led, from the situation and manner of occupation of the two estates, to hold that the right was not a personal right, but constituted an easement in favor of the adjoining estate.

It is to be noted also that there are no words of re-entry, reverter, or forfeiture in the clause which we are considering. Such words are not necessary to constitute an estate upon condition. But, if the grantor had intended to create a personal right in himself and his heirs and devisees in distinction from the rights of way and drainage created by reservation, it is not improbable, to say the least, that he would have added words so characteristic of estates upon condition. The cases of *Badger* v. *Boardman*, 16 Gray, 559; *Jewell* v. *Lee*, 14 Allen, 145, 92 Am. Dec. 744; *Sharp* v. *Ropes*, 110 Mass. 381; and *Dana* v. *Wentworth*, 111 Mass. 291,—are clearly distinguishable from this. This is a case as in *Peck* v. *Conway*, 119 Mass. 546, and *Clark* v. *Martin*, 49 Pa. 289, of a grantor owning and occupying a homestead, and own-

ing and conveying an adjoining lot subject to a building limitation. Naturally the limitation would be intended for the benefit of the homestead. In *Peck* v. *Conway*, 119 Mass. 546, the adjoining lot was vacant. In *Clark* v. *Martin*, 49 Pa. 289, there was a house upon it. In the present case there was a store upon it, which stood further back from the street than the homestead occupied by the grantor, thereby giving the homestead increased light, air, and prospect, which it was the manifest object of the condition to retain. In neither *Badger* v. *Boardman*, *Jewell* v. *Lee*, *Sharp* v. *Ropes*, nor *Dana* v. *Wentworth*, were the circumstances surrounding the parties when their deeds were made at all similar to those surrounding the parties when the deed in this case was made. I think, therefore, that whether the provision is called a "condition" or a "restriction," the plaintiff, as owner of the adjoining premises, is entitled to the benefit of it, and that a decree should be entered in his favor.

Knowlton and **Lathrop**, JJ., concur in this opinion.

RICHARDSON
v.
Inhabitants of DANVERS.

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

A bicycle is not within the meaning of a statute passed in 1786, requiring highways to be kept reasonably safe for carriages.

(June 21, 1900.)

EXCEPTIONS by defendant to rulings of the Superior Court for Essex County made during the trial of an action brought to recover damages for personal injuries alleged to have been received through a defect in the highway which resulted in a judgment in plaintiff's favor. *Sustained.*

The facts are stated in the opinion.

Mr. **H. P. Moulton** for plaintiff.

Mr. **Daniel N. Crowley** for defendant.

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

The plaintiff, while riding a bicycle on a highway which the defendant was bound to keep in repair, encountered a depression in the way, and fell from her wheel and was injured. The jury returned a verdict in her favor, and the case comes before us on several exceptions to the exclusion of evidence, and to the refusal of the court to rule that a bicycle is not a carriage, within the meaning of Pub. Stat. chap. 52, § 1. The statute in question provides that highways and other ways named shall be kept in repair, at the expense of the town, city, or place where they are situated, "so that the same may be reasonably safe and convenient for travelers, with their horses, teams, and carriages at all seasons of the year." This statute was enacted in 1786, and has been in force ever since. Stat. 1786, chap. 81, § 1; Rev. Stat. chap. 25, § 1; Gen. Stat. chap. 44, § 1; Stat. 1877, chap. 234. The question, then, is whether a bicycle is a carriage, within the meaning of this term in the statute. We have no doubt that for many purposes a bicycle may be considered a vehicle or a carriage. It may be lawfully used on the highway, and is subject to the law of the road. *State* v. *Collins*, 16 R. I. 371, 3 L. R. A. 394, 17 Atl. 131; *Myers* v. *Hinds*, 110 Mich. 300, 33 L. R. A. 356, 68 N. W. 156; *Taylor* v. *Union Traction Co.* 184 Pa. 465, 40 Atl. 159; *Thompson* v. *Dodge*, 58 Minn. 555, 28 L. R. A. 608, 60 N. W. 545. So, under a law prohibiting a person from riding or driving any sort of carriage furiously. *Taylor* v. *Goodwin*, L. R. 4 Q. B. Div. 228. So, under laws or ordinances prohibiting driving on the sidewalk. *Reg.* v. *Justin*, 24 Ont. Rep. 327; *Mercer* v. *Corbin*, 117 Ind. 450, 3 L. R. A. 221, 20 N. E. 132; *Com.* v. *Forrest*, 170 Pa. 40, 29 L. R. A. 365, 32 Atl. 652. Under a law permitting the collection of tolls on a turnpike, a bicycle was held to be a carriage. *Geiger* v. *Perkiomen & R. Turnp. Road*, 167 Pa. 583, 28 L. R. A. 458, 31 Atl. 918. The opposite was held in *Williams* v. *Ellis*, L. R. 5 Q. B. Div. 175, and in *Murfin* v. *Detroit & E. Pl. Road Co.* 112 Mich. 675, 38 L. R. A. 198, 71 N. W. 1108. And in Scotland, in an action on a policy of insurance, it was held that a person riding a bicycle was not "traveling as a passenger in an ordinary vehicle." *McMillan* v. *Insurance Co.* 4 Scots L. T. 96. The statute in question was passed long before bicycles were invented, but although, of course, it is not to be confined to the same kind of vehicles then in use, we are of opinion that it should be confined to vehicles *ejusdem generis*, and that it does not extend to bicycles. This view is favored by the provision in Pub. Stat. chap. 52, § 18, which provides that no damage shall be recovered "by a person whose carriage and the load thereon exceed the weight of 6 tons." The words last quoted were first added by Stat. 1838, chap. 104. It seems to us that the legislature, by the use of the word "carriage," had in view a vehicle which could carry passengers or inanimate matter, not to exceed, with its load, more than 6 tons. As was said in *State ex rel. Bettis* v. *Missouri P. R. Co.* 71 Mo. App. 385, 393: "While the terms in question are flexible, and may include the new uses, falling within the legitimate scope of their meaning, which arise in the growth of society, we are not warranted in giving them a new meaning so as to cover different subjects, not within the principle upon which they are founded. To do this would be judicial legislation." A bicycle is more properly a machine than a carriage, and so it is defined in Murray's Dictionary. It is also so considered in Stat. 1894, chap. 479, which is an act to regulate the use of bicycles and similar vehicles, and in the amendatory act of 1898 (Stat. 1898, chap. 121).

NOTE.—For law as to bicycles, see Taylor v. Union Traction Co. (Pa.) 47 L. R. A. 289, and *note*.

As to bicycle paths, see State v. Bradford (Minn.) 47 L. R. A. 144.

A bicycle is of but little use in wet weather or on frozen ground. Its great value consists in the pneumatic tire, but this is easily punctured, and no one who uses a wheel thinks of taking a ride of any distance without having his kit of tools with him. A hard rut, a sharp stone, a bit of coal or glass, or a tack in the road may cause the tire to be punctured, and this may cause the rider to fall and sustain an injury. It would impose an intolerable burden upon towns to hold them bound to keep their roads in such a state of repair and smoothness that a bicycle could go over them with assured safety. It is because ordinary roads are not considered suitable for bicycles that cities and towns are given the power by Stat. 1898, chap. 351, to lay out, construct, and maintain paths for bicycles. And Stat. 1899, chap. 474, makes it a misdemeanor to trespass upon a cycle path by driving thereon with a horse or other animal, except to cross the same. We are therefore of opinion that a bicycle is not a "carriage," within the meaning of that term in Pub. Stat. chap. 52, § 1. This view of the case renders it unnecessary to consider the other exceptions.

Exceptions sustained.

MICHIGAN SUPREME COURT.

Kate HEWITT
v.
Village of REED CITY, *Appt.*

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

Submission of authorities to an arbitrator after close of the testimony, where it is expressly agreed that neither party is to be represented by counsel, is a violation of the spirit of the submission, which will avoid the award.

(May 2, 1900.)

APPEAL by defendant from a decree of the Circuit Court for Osceola County in favor of complainant in a proceeding to set aside an award. *Affirmed.*

The facts are stated in the opinion.

Mr. **Charles A. Withey** for appellant.

Messrs. **Smurthwaite & Fowler** and **Michael Brown,** with *Mr.* **Walter W. Drew,** for appellee:

Every reasonable presumption will be indulged in by the courts for the purpose of upholding an award, to give it effect and accomplish the ends of justice.

Clement v. *Comstock*, 2 Mich. 359; *Bush* v. *Davis*, 34 Mich. 190; *Wood* v. *Treleven*, 74 Wis. 577, 43 N. W. 488; Morse, Arbitration & Award, 411.

No mistake appears upon the face of the award or submission in this case, that is material to the findings and award made; therefore in no event should that award be set aside.

Sweet v. *Morrison*, 116 N. Y. 19, 22 N. E. 276; *Fudickar* v. *Guardian Mut. L. Ins. Co.* 62 N. Y. 392; *Halstead* v. *Seaman*, 52 How. Pr. 415; *Underhill* v. *VanCortlandt*, 2 Johns. Ch. 339; *Winship* v. *Jewett*, 1 Barb. Ch. 173; *Conger* v. *James*, 2 Swan, 213; *Roloson* v. *Carson*, 8 Md. 208; *Hartshorne* v. *Cutrell*, 2 N. J. Eq. 297; *Ryan* v. *Blount*, 18 N. C. (1 Dev. Eq.) 383; *Valle* v. *North Missouri R. Co.* 37 Mo. 450; *Anderson* v. *Darcy*, 18 Ves. Jr. 447; Story, Eq. Jur. §§ 1453, 1457; 2 Pom. Eq. Jur. 849.

One seeking to set aside an award on the ground of mistake must show that the award would have been different had the mistake not occurred.

Gorham v. *Millard*, 50 Iowa, 554; *DeCastro* v. *Brett*, 56 How. Pr. 484; *Halstead* v. *Seaman*, 52 How. Pr. 415; 6 Wait, Act. & Def. 554.

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

This is a bill filed to set aside an award. Complainant was injured by reason of a defective sidewalk of the village. A claim was presented to the common council, and after a period of negotiation an agreement was reached to submit the matter in controversy to Hon. James B. McMahon, as arbitrator. A hearing was had before the arbitrator, testimony produced pro and con, and an award made in favor of the village. The bill in this case contains charges of overreaching, made against the village attorney and the president of the village, and also alleges that complainant was not permitted to produce her proofs before the arbitrator. We are not only convinced that these charges are not sustained by a preponderance of the evidence, but we deem it only just to the parties concerned to say that the charges ought not to have been made. There is nothing to indicate any misconduct or overreaching on the part of Mr. Withey, the village attorney, or Mr. Slosson, the village president. Complainant had employed counsel to present her claim to the village authorities, was aided by the advice of her husband, and, we have no doubt, understood the matter to be submitted; nor have we any doubt that she was permitted to adduce all testimony which she deemed necessary. The only question which has given us any doubt arises out of the mistaken conduct of the village president in furnishing the arbitrator, after the testimony was closed, a memorandum of cases or authorities. Just what these cases related to does not clearly appear, as the memorandum is not produced, and the recollections of Judge McMahon and Mr. Slosson differ. The rule is very strict in excluding any communication to an arbitrator, made *ex parte* after the case is submitted; and

NOTE.—On the misconduct of arbitrators, see also Hartford F. Ins. Co. v. Bonner Mercantile Co. (C. C. D. Mont.) 11 L. R. A. 623, and *note.*

when such communication, which may affect the result, is made, it is not usual to enter into an inquiry as to whether the arbitrator was in fact influenced by it or not. *Walker* v. *Frobisher*, 6 Ves. Jr. 70; *Strong* v. *Strong*, 9 Cush. 560; *Catlett* v. *Dougherty*, 114 Ill. 568, 2 N. E. 669; *Jenkins* v. *Liston*, 13 Gratt. 535; 2 Am. & Eng. Enc. Law, 2d ed. p. 646. It is contended that this rule should not be applied to the present case, as all that occurred was a mere citation of authorities; but it is to be kept in mind that the arbitrator is judge of the law as well as of the facts, and in this case the parties expressly agreed that neither was to be represented by counsel, thereby stipulating to exclude all legal arguments or briefs. It cannot be denied that the purpose of any citation must have been to influence the mind of the arbitrator on a question of law. We hold, with some reluctance, that this is a violation of the spirit of the terms of the submission. Judge McMahon himself testified that the handing of this memorandum to him was, to use his language, the most unsatisfactory thing connected with the transaction. If we felt at liberty to determine the case upon the question of whether the result was probably influenced by this representation, we would have little difficulty, as the high character and unquestioned ability of the arbitrator would furnish ample assurance that he was not unduly influenced in the matter; but, as this is the first time that the question has been presented to the court in this exact way, we are concerned in laying down a rule easy to follow, and which will afford protection in all cases, and we think the safer rule is for the court to enter into no examination as to whether the arbitrator is in any way influenced by *ex parte* communications.

In applying that rule to this case, and in view of the stipulation that neither party should be represented by counsel, we are constrained to hold that the arbitration should be set aside. This was the conclusion reached by the learned circuit judge, and his *decree will be affirmed*, with costs.

The other Justices concur.

Katherina SHINGLEMEYER
v.
Oliver A. WRIGHT, *Plff. in Err.*

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

1. **A statement of facts in appellant's brief**, which is conceded to be correct, will be so regarded by the court, and an independent statement in appellee's brief, of facts which he considers necessary to a full understanding of the questions raised, will not be considered by the court, under a rule which provides that the statement by appellant shall be deemed accurate, unless the opposite party points out wherein it is insufficient or inaccurate.
2. **Information given to detectives** in regard to larceny, and a statement of the suspicion that a certain person is the thief, with the reason for such suspicion, are privileged.
3. **Privileged communications which cannot themselves form the basis** for an action of slander are not admissible for the purpose of showing malice in other communications.
4. **The maxim Volenti non fit injuria** applies to alleged slanderous statements made in the presence of an officer, where the subject of the statements solicited them and sent for the officer for the express purpose of having the statements repeated in his presence.
5. **One who charges another with crime is not liable** for false imprisonment on account of an arrest made by an officer without any request from him, and when the person arrested sent for the officer for the express purpose of having the accusation repeated in his presence.

(May 18, 1900.)

ERROR to the Circuit Court for Wayne County to review a judgment in favor of plaintiff in an action brought to recover damages for alleged slander and false imprisonment. *Reversed.*

Statement by **Long, J.**:

This is a suit by one Katherina Shinglemeyer against *Oliver A. Wright* by capias for an alleged slander claimed to have been uttered by defendant to one Henry, a policeman, upon the 16th of July, 1898, and for a false imprisonment which the plaintiff claims to have suffered upon the same day at the hands of the said Henry, acting under the instructions of the said defendant.

The plaintiff's testimony was to the following effect: That previous to April, 1898, she had had trouble with George Wright, a brother of the defendant, living at Columbus; that in April, 1898, she caused the said George Wright to be arrested upon a charge of bastardy, upon which charge he was put under bond, and had also sued him for breach of promise of marriage. It is the claim of the plaintiff that some time in the fall of 1897 or the spring of 1898 George Wright came to the place where she was working, and borrowed $22 from her, and that Oliver Wright, the defendant, was with him, and stood outside of the door. She stated upon cross-examination that she had only seen Oliver Wright once before, and that was in Delaware, Ohio, and that she did not know Oliver Wright well enough to say whether it was Oliver Wright who called with George Wright that night or not. Upon the 3d day of July, 1898, the plaintiff came to Detroit, where Oliver Wright resided, and upon the witness stand claimed that her purpose was to get the $22 which she claimed George Wright had borrowed for defendant's use from her at the time heretofore referred to.

NOTE.—As to privileged communications in legal proceedings, see (for words in pleading) Randall v. Hamilton (La.) 22 L. R. A. 649, and *note;* Sherwood v. Powell (Minn.) 29 L. R. A. 153; (as to defamatory testimony) Cooper v. Phipps (Or.) 22 L. R. A. 836, and *note;* and Blakeslee v. Carroll (Conn.) 25 L. R. A. 106.