LAWYERS' REPORTS, ANNOTATED.

BOOK V.

ALL CURRENT CASES

OF

GENERAL VALUE AND IMPORTANCE

DECIDED IN

THE UNITED STATES, STATE AND TERRITORIAL COURTS,

WITH FULL ANNOTATION

BY

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EDITOR IN CHIEF OF THE UNITED STATES SUPREME COURT AND GENERAL DIGESTS,—THE PUBLISHER'S EDITORIAL STAFF, AND THE SEVERAL REPORTERS AND JUDGES OF EACH COURT, ASSISTING IN SELECTION.

(5 L. R. A.)

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BOOK 5,

NOT OFFICIALLY REPORTED WHEN THIS BOOK WENT TO PRESS.

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LAWYERS' REPORTS,

ANNOTATED.

MASSACHUSETTS SUPREME JUDICIAL COURT.

Francis J. STRATTON *et al.*
v.
The PHYSIO-MEDICAL INSTITUTE *et al.*

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

1. A claim by the Physio-Medical Institute to a legacy given to the Physio-Medical College has not sufficient merit to warrant the allowance of claimant's costs out of the fund, if the evidence plainly shows that claimant was not the legatee intended.

2. A legacy to a medical institution already in existence, which is not a free or public school, but a private pecuniary enterprise, is not a bequest to a public charity; and in case the beneficiary ceases to exist before the will takes effect the court will not apply the gift *cy près*.

NOTE.—*Public charities; Statute of Uses and Trusts, 43 Eliz. chap. 4.*

The Statute of Uses and Trusts, 43 Eliz. chap. 4, has never been extended to or adopted in this country. See Cottman v. Grace, 3 L. R. A. 146, *note*, 112 N. Y. 299.

It has not been adopted in Alabama (Carter v. Balfour, 19 Ala. 814; Williams v. Pearson, 38 Ala. 299) nor in Connecticut (Adye v. Smith, 44 Conn. 60; American Bible Soc. v. Wetmore, 17 Conn. 181).

It is repudiated in Georgia (Adams v. Bass, 18 Ga. 130); and in North Carolina (McAuley v. Wilson, 1 Dev. Eq. 276; Bridges v. Pleasants, 4 Ired. Eq. 26); and is not in force in Wisconsin (Heiss v. Murphey, 40 Wis. 292); nor in Maryland. Beatty v. Kurtz, 27 U. S. 2 Pet. 566 (7 L. ed. 521); Ould v. Washington Hospital, 95 U. S. 303 (24 L. ed. 450); Dashiell v. Atty-Gen. 5 Har. & J. 392; State v. Warren, 28 Md. 353.

It is not resorted to in Indiana. Grimes v. Harmon, 35 Ind. 198; Lepage v. McNamara, 5 Iowa, 147.

But its principles are recognized in Connecticut (Greene v. Dennis, 6 Conn. 293; Brewster v. McCall, 15 Conn. 274); and are in force in Maine, and are a part of the law of that State (Tappan v. Deblois, 45 Me. 122; Preachers' Aid Soc. v. Rich, 45 Me. 552; Howard v. American Peace Soc. 49 Me. 288; Drew v. Wakefield, 54 Me. 291); and in New Jersey (Hendrickson v. Shotwell, 1 N. J. Eq. 577; Stevens v. Shippen, 28 N. J. Eq. 487; DeCamp v. Dobbins, 29 N. J. Eq. 43; Hesketh v. Murphy, 35 N. J. Eq. 29); in Pennsylvania by common usage and constitutional recognition. Bethlehem Borough v. Perseverance Fire Co. 81 Pa. 445; Zimmerman v. Anders, 6 Watts & S. 218; Methodist Church v. Remington, 1 Watts, 218; Witman v. Lex, 17 Serg. & R. 89; Lawrence County v. Leonard, 83 Pa. 206; Price v. Maxwell, 28 Pa. 23; Cresson's Appeal, 30 Pa. 450; Fire Ins. Patrol v. Boyd, 120 Pa. 644, 1 L. R. A. 417, *note*.

So, its principles are in force in Ohio (Miller v. Teachout, 24 Ohio St. 533); and Vermont (Burr v. Smith, 7 Vt. 241; McAllister v. McAllister, 46 Vt. 272. See Cruikshank v. Home for the Friendless, 4 L. R. A. 140, *note*, 113 N. Y. 337); and as administered by English chancery in its regular jurisdiction is part of the law of Rhode Island. Pell v. Mercer, 14 R. I. 412.

Uses and trusts have been abolished in the following States by statute; and in such States the same requisites are there as essential to the validity of charitable trusts as are required for other trusts: Michigan (Newark M. E. Church v. Clark, 41 Mich. 741; Hathaway v. New Baltimore, 48 Mich. 254); New York (Beekman v. Bonsor, 23 N. Y. 298; Holmes v. Mead, 52 N. Y. 339; Wetmore v. Parker, 52 N. Y. 450; Bascom v. Albertson, 34 N. Y. 602; Cottman v. Grace, 3 L. R. A. 145, 112 N. Y. 299); North Carolina (State v. Gerard, 2 Ired. Eq. 210); Virginia (Gallego v. Atty-Gen. 3 Leigh, 450; Seaburn v. Seaburn, 15 Gratt, 426; Wheeler v. Smith, 50 U. S. 9 How. 55, (13 L. ed. 44).

Statute of Uses and Trusts construed. See Haxtun v. Corse, 2 Barb. Ch. 506, 5 N. Y. Ch. L. ed. 732.

The doctrine of cy près stated.

Where there is an intention exhibited to devote the gift to charity, and no object is mentioned, or the particular object fails, the court will execute the trust *cy près* and will apply the fund to some charitable purpose similar to those mentioned by the donor. If the donor declares his intention in favor of charity indefinitely, without any specification of objects or in favor of defined objects which happen to fail, from whatever cause, even though in such cases the particular mode of operation contemplated by the donor is uncertain and impracticable, yet the general purpose being charity, such purpose will, notwithstanding the indefiniteness, illegality, or failure of its immediate objects, be carried into effect. A limitation upon the generality of the doctrine seems to be, that where the donor has not expressed his charitable intention generally, but only by providing for one specific object, and this object cannot be carried out, or the charity provided for ceases to exist before the gift takes effect, then the court will not execute the trust and it wholly fails. 2 Pom. Eq. Jur. 595; Fisk v. Atty-Gen. L. R. 4 Eq. 521; New v. Bonaker, L. R. 4 Eq. 655; *Re* Clark's Trust, L. R. 1 Ch. Div. 497; Clephane v. Lord Provost of Edinburgh, L. R. 1 H. L. Sc. 417; Cherry v. Mott, 1 Myl. & Cr. 123; Clark v. Taylor, 1 Drew. 642; Russell v. Kellett, 3 Smale & G. 264; Langford v. Gowland, 3 Giff. 617.

This doctrine is called the rule of approximation, or *cy près*, *i. e.*, of carrying into effect the testator's intentions, as nearly as may be, according to the rules of law. See Potter v. Chapin, 6 Paige, 639; Lorillard v. Coster, 5 Paige, 172.

American courts apply *cy près* rules in effectuating the especial design of the testator, though not in diverting his charity to other objects than those specified in the will. Gilman v. Hamilton, 16 Ill. 225.

Where a literal execution becomes inexpedient or

See also 11 L. R. A. 282; 12 L. R. A. 117; 19 L. R. A. 413; 21 L. R. A. 454; 22 L. R. A. 179; 24 L. R. A. 158; 38 L. R. A. 629.

3. If the main object of a legacy is to support a particular institution for the promotion of a particular art, the gift will fail upon failure of the donee, although the bequest is to a public charity.

(June, 1889.)

CASE reserved for determination of the whole court upon the questions of law raised by the report of the master. *Decree for plaintiffs.*

The facts are stated in the opinion.

Mr. **A. A. Ranney** for plaintiffs.

Mr. **Joseph Wilby** for Physio-Medical Institute.

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

This is a bill brought by the son and widow of John Stratton, to obtain a decree that one-fourth of the income of the residue under John Stratton's will directed by him to be paid to the trustees of the Physio-Medical College of Cin-

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impracticable, the court will execute it as nearly as it can according to the original purpose, or *cy près*. See Philadelphia Baptist Asso. v. Hart, 17 U. S. 4 Wheat. 1 (4 L. ed. 499); 28 U. S. 3 Pet. 481 (7 L. ed. 749); Inglis v. Sailors' Snug Harbor, 28 U. S. 3 Pet. 99 (7 L. ed. 617); Atty-Gen. v. Wansay, 15 Ves. Jr. 232; Atty-Gen. v. Boultbee, 2 Ves. Jr. 380; Atty-Gen. v. Oglander, 3 Bro. Ch. 166; Atty-Gen. v. Green, 2 Bro. Ch. 492; Jones v. Peacock, Finch, 245; Lewis, Perp. 504.

A charitable use, derived from the public, vested in trust in a municipality, it also being the beneficiary, may be transmuted to other municipal purposes with the sanction of the Legislature. Mayor, etc. of Newark v. Stockton (N. J.) 44 N. J. Eq. 179, 13 Cent. Rep. 245.

If the trustee of a charitable use be about to alienate or transform the property so as to carry into effect, in the most reasonable manner, the object of the grant, such act will not be enjoined. *Ibid.*

Doctrine not usually adopted in construction of wills.

In this country, the construction of wills *cy près* is not usually adopted on behalf of charities. Philadelphia Baptist Asso. v. Hart, 17 U. S. 4 Wheat. 1 (4 L. ed. 499); Same v. Smith, 28 U. S. 3 Pet. 481 (7 L. ed. 749); Going v. Emery, 16 Pick. 107; Winslow v. Cummings, 3 Cush. 358; 2 Story, Eq. § 1162; 4 Kent, Com. 5th ed. 508; O'Hara, Wills, 499; Coggeshall v. Pelton, 7 Johns. Ch. 292.

The courts of some States regard the *cy près* power with disfavor, as an excrescence on the law, sapping and perverting it, rather to be cut off than adopted. White v. Fisk, 22 Conn. 31; Adye v. Smith, 44 Conn. 60; Green v. Allen, 5 Humph. 170; Lepage v. McNamara, 5 Iowa, 124.

The courts of the State of New York have not been invested with the *cy près* power. The repeal of the Statute of Elizabeth and the Mortmain Acts by the legislation of 1788, abrogated the English law of indefinite charitable uses. See Bascom v. Albertson, 34 N. Y. 584.

They refuse to enforce the execution of a charitable use which cannot be executed except upon the doctrine of *cy près*. See Beekman v. People, 27 Barb. 260; Ayres v. Methodist Epis. Church, 3 Sandf. 351; Wilson v. Lynt, 16 How. Pr. 348, 30 Barb. 124.

The prerogative branch of the *cy près* power is totally at variance with the institutions of this country and has no existence whatever in the United States. See Fontain v. Ravenel, 58 U. S. 17 How. 384 (15 L. ed. 80).

It certainly cannot be exercised by the judiciary of a State whose Constitution declares that "the judicial department shall never exercise the legislative and executive powers, or either of them, to the end it may be a government of laws and not of men." Declaration of Rights (Mass.) art. 30.

It has never been introduced into the practice of any court in this country; and, if it exists anywhere here, it is in the Legislature of the Commonwealth as succeeding to the powers of the King as *parens patriæ*. See Fountain v. Ravenel, 58 U. S. 17 How. 369, 384 (15 L. ed. 80, 86); Moore v. Moore, 4 Dana, 365, 366; Witman v. Lex. 17 Serg. & R. 93; Atty-Gen. v. Jolly, 1 Rich. Eq. 108; Dickson v. Montgomery, 1 Swan, 348; Lepage v. McNamara, 5 Iowa, 146; Bartlet v. King, 12 Mass. 545; Sohier v. Massachusetts Gen. Hospital, 3 Cush. 496, 497.

Distinction between charitable and other trusts.

The most important distinctions between charitable and other trusts is in the time of duration allowed and the degree of definiteness required. Jackson v. Phillips, 14 Allen, 550.

The Revised Statutes against perpetuities and regulating uses and trusts were aimed at private trusts and accumulations for remote posterity. Public trusts and charitable uses were not within the intention of the Legislature, or the spirit and object of the enactment. Shotwell v. Mott, 2 Sandf. Ch. 50.

A dedication for pious or charitable purposes does not vest a legal right, but merely creates a pious or charitable trust, which under our statute relative to religious corporations is turned into a legal estate. Post v. Pearsall, 22 Wend. 435. See Curd v. Wallace, 7 Dana, 192.

Trust funds held for a charitable object are not liable for injuries caused by the torts of their trustee. Fire Ins. Patrol v. Boyd, 1 L. R. A. 417, 120 Pa. 624.

Law against perpetuities no application to charitable trusts.

The law against perpetuities and remoteness has no application, and there is nothing to restrain the donor from applying such limitations and contingencies in point of time to his charitable gift as he pleases. Society for Propagation of the Gospel v. Atty-Gen. 3 Russ. 142; Christ's Hospital v. Grainger, 16 Sim. 100, 1 Macn. & G. 464, 1 Hall & T. 539; McDonogh v. Murdoch, 56 U. S. 15 How. 367 (14 L. ed. 732); Storrs Agricultural School v. Whitney, 3 New Eng. Rep. 573, 54 Conn. 348.

When such uses are consummated, and no longer *in fieri*, the law of perpetuity has no application. Inglis v. Sailors' Snug Harbor, 28 U. S. 3 Pet. 99 (7 L. ed. 617); Coit v. Comstock, 51 Conn. 385.

One charity made contingently to succeed another does not fall within the reason of the rule against perpetuities. Storrs Agricultural School v. Whitney, 3 New Eng. Rep. 573, 54 Conn. 342.

The primary gift was invalid, as there was contemplated a period measured by years, not by lives, during which there would be no person in existence by whom an absolute estate in possession could be conveyed, and so there was an unlawful suspension of the power of alienation. Cruikshank v. Home for the Friendless, 4 L. R. A. 140, 113 N. Y. 337.

The gift was not saved by the fact that an institution, such as contemplated by the testator, could have been incorporated under the general law, as such a corporation was not intended or directed, but one formed under a special charter. Cruikshank v. Home for the Friendless, *supra*.

To a similar effect are Leonard v. Burr, 18 N. Y. 107, in which the gift was to the Village of Gloversville, when it should be incorporated, for a public

cinnati, Ohio, be paid to the plaintiffs, on the ground that there is no such institution.

The words of the will are: "One-quarter part of the net income is to be paid semi-annually to the trustees of the Physio-Medical College of Cincinnati, Ohio, to be used by the college for the promotion of the Medical Art as favored and believed in by me during my lifetime, and in support of that institution, as the trustees thereof shall from time to time determine, the same to be paid to the treasurer of the institution duly authorized."

The master reports that the testator supposed that there was a corporation of the name used by him, of which one Curtis, at whose instance he gave the legacy, was president or director; that there was no such corporation in existence at the testator's death, but that Curtis lectured and taught, alone or with others, under that name, and that Curtis' medical school was the one meant. This school ceased to exist at Curtis' death in 1881.

The income is claimed by a corporation called the Physio-Medical Institute. Assuming that

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library; Dodge v. Pond, 23 N. Y. 69, where the bequest was for a college to be founded in Liberia; Beekman v. Bonson, 23 N. Y. 396, in which an effort was made to found a dispensary; and Rose v. Rose, 4 Abb. App. Dec. 108. One vice in all these cases was that by force of the limitations created the ownership was left "swinging in abeyance." Cruikshank v. Home for the Friendless, 4 L. R. A. 140, 113 N. Y. 352.

In each of the following cases, namely, Brattle Square Church v. Grant, 3 Gray, 142; Wells v. Heath, 10 Gray, 17, and Society for Promoting Theological Education v. Atty-Gen. 135 Mass. 285,—there was a devise to a charitable use with a proviso that in case of misapplication it should go to the kindred of the donor. Such proviso was held to be void as offending the statute against perpetuities. But in each case the gift over was for a commercial, not a charitable, use; and the law will not, in behalf of such, forgive the offense against the statute. Storrs Agricultural School v. Whitney, 3 New Eng. Rep. 573, 54 Conn. 346.

Funds cannot be established indefinitely inalienable in the hands of those to whom they are intrusted, and their successors, the income of which is to be perpetually devoted to uses which are not, legally speaking, charitable. Odell v. Odell, 10 Allen, 1; Bates v. Bates, 134 Mass. 111.

A provision in a will, establishing a fund for the preservation, adornment, and repair of a private monumental structure, creates a perpetuity for a use not charitable, and is void. Bates v. Bates, 134 Mass. 111; Durour v. Motteux, 1 Ves. Sr. 320; Doe v. Pitcher, 6 Taunt. 360; Lloyd v. Lloyd, 2 Sim. N. S. 264; Rickard v. Robson, 31 Beav. 244; Fowler v. Fowler, 33 Beav. 616; Carne v. Long, 8 Week. Rep. 570; Mellick v. Asylum, Jacob, 180.

A bequest in trust to the mayor of a city and the presidents of two incorporated societies and their successors to hold in trust forever constitutes an unlawful suspension of alienation, and is void. Cottman v. Grace, 3 L. R. A. 145, *note*, 112 N. Y. 299.

Statute against perpetuities construed. See Cruikshank v. Home for the Friendless, 4 L. R. A. 140, *note*, 113 N. Y. 337; Cottman v. Grace, *supra*; Fire Ins. Patrol v. Boyd, 1 L. R. A. 417, *note*, 120 Pa. 624.

Where the language of the will is plain and unambiguous it cannot be wrested from its natural import in order to avoid the effect of the rule against perpetuities. Cottman v. Grace, *supra*.

Charitable trusts; when void.

It is a general principle in the law of charities that, if the charity be general, indefinite and of a mere private nature or not within the scope of the Statute of Elizabeth, it will be treated as void, and the property must go either as an absolute gift to the trustee selected to distribute it, or he must be trustee for the next of kin. Reformed Prot. Dutch Church v. Mott, 7 Paige, 77; Philadelphia Baptist Asso. v. Hart, 17 U. S. 4 Wheat. 1 (4 L. ed. 499); Fowler v. Garlike, 1 Russ. & M. 232; Stubbs v. Sargon, 2 Keen, 255; Ommanney v. Butcher, 1 Turn. & R. 260.

If it is clearly seen that the testator had but one particular object in his mind and that purpose cannot be answered, the next of kin will take, there being in such case no general charitable intention. See Corbyn v. French, 4 Ves. Jr. 419; De Garcin v. Lawson, 4 Ves. Jr. 433, *note*.

If a bequest be to an association illegally incorporated it is void, there being no beneficiary capable of taking. Philadelphia Baptist Asso. v. Hart, 17 U. S. 4 Wheat. 1 (4 L. ed. 499); see, however, Johnson v. Mayne, 4 Iowa, 180.

Cy près means, as near as may be to the charity which has failed: hence, where a gift to charity cannot be executed it does not fall into the residue, merely because the residue may have been dedicated to a charitable purpose. See Mayor of Lyons v. Advocate Gen. L. R. 1 App. Cas. 91.

And this rule applies to a surplus of fund, not contemplated by the donor (see Bishop of Hereford v. Adams, 7 Ves. Jr. 324); and conversely to a deficiency where the intention is carried out *cy près* to the extent of the fund. See Atty-Gen. v. Pyle, 1 Atk. 435.

Where a gift is to trustees conditioned for the payment of a certain sum in charity, that sum is not to be increased because the incomes increase. See Atty-Gen. v. Wax Chandlers' Co. L. R. 8 Eq. Cas. 452.

A fund is not sustainable where the trustees have an absolute, uncontrollable power of disposition, and may absorb the whole (see Ellis v. Selby, 7 Sim. 352); or to objects of benevolence such as the trustee in his discretion should approve of or think most advantageous or beneficial. See Morice v. Bishop of Durham, 10 Ves. Jr. 522; Williams v. Kershaw, 5 L. J. N. S. (Ch.) 84, 5 Clark & F. 111; Brown v. Yeale, 7 Ves. Jr. 50, *note*; Saltonstall v. Sanders, 11 Allen, 446.

In Massachusetts a bequest of plate, pictures, etc., to one as executor to dispose of absolutely as he may deem expedient, vested an absolute property in him which passed to his kin upon his death before qualifying as executor. Wells v. Doane, 3 Gray, 201; but compare Jackson v. Phillips, 14 Allen, 584.

Testator bequeathed the residue to his executors in trust to pay and apply the same, in such sums and at such times as they should think fit, to one or more societies for the support of indigent, respectable persons, giving them "full discretionary power as to the disposition of the same, but so that it shall be applied to objects of charity." It was held void, for being for a general indefinite charitable purpose, without fixing any particular object. Beekman v. People, 27 Barb. 260. Compare Beekman v. Bonsor, 23 N. Y. 298.

Where object too indefinite, the trust fails.

A trust which by its terms may be applied to objects which are not charitable in the legal sense, and to persons not defined by name or by class, is too indefinite to be carried out. Chamberlain v. Stearns, 111 Mass. 267; James v. Allen, 3 Meriv. 17; Morice v. Bishop of Durham, 9 Ves. Jr. 399, 10 Ves. Jr. 522.

A devise in trust "to distribute the residue in such manner as in his discretion shall appear best

See also 15 L. R. A. 235; 21 L. R. A. 454.

it would be possible for that corporation to take a gift to the Physio-Medical College (*Hinckley* v. *Thatcher*, 139 Mass. 477; *Tucker* v. *Seaman's Aid Society*, 7 Met. 188, 209), it could not do so in the absence of evidence appropriating to it a name which on its face denotes a different body. *Minot* v. *Boston Asylum & Farm School*, 7 Met. 416; *Am. Bible Society* v. *Pratt*, 9 Allen, 109.

But the evidence has not that effect, and the master finds that the name in the will does not mean the Physio-Medical Institute. We do not think that the claim of this defendant had sufficient ground to warrant the allowance of its costs out of the fund.

The plaintiff has argued that the income should not be applied *cy près*. The Attorney-General makes no argument that it should be so applied. The attempt of the Physio-Medical Institute to raise the question by an amendment to its answer was disallowed and it did not seek to reopen the matter at the hearing before us.

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calculated to carry out wishes which I have expressed or may express to him" is too indefinite to be carried out. Olliffe v. Wells, 130 Mass. 221; Nichols v. Allen, 130 Mass. 211.

"To disburse from my estate to such worthy persons and objects as she may deem proper, such sums as it is her pleasure thus to appropriate, not to exceed in all five thousand dollars," was held to be invalid. Bristol v. Bristol, 2 New Eng. Rep. 759, 53 Conn. 242.

A devise of a farm to selectmen of a town in trust, the rents, incomes, and profits to be appropriated to the support of a gospel minister or ministers, conveys to devisees a fee of the premises. Wells v. Heath, 10 Gray, 27. See Cottman v. Grace, 3 L. R. A. 145, *note*, 112 N. Y. 299.

A cemetery corporation, which voluntarily uses its funds for objects akin to the purposes of its organization, is not a public charity, but is liable to the proprietor of a grave for the negligent burial of a stranger therein. Donnelly v. Boston Catholic Cemetery Asso. 5 New Eng. Rep. 741, 146 Mass. 163.

When trust results to testator's legatees or next of kin.

If the trust set up is a lawful one, it inures to the benefit of the *cestui que trust*, and if it is unlawful, the heirs or next of kin take by way of resulting trust. Boson v. Statham, 1 Eden, 508, 1 Cox, Ch. 16; Russell v. Jackson, 10 Hare, 204; Wallgrave v. Tebbs, 2 Kay & J. 313.

When a gift or bequest is made in terms clearly manifesting an intention that it shall be taken in trust, and the trust is not sufficiently defined to be carried into effect, the donee or legatee takes the legal title only, and a trust results by implication of law to the donor and his representatives or to the testator's residuary legatees or next of kin. Nichols v. Allen, 130 Mass. 212; Minot v. Baker, 6 New Eng. Rep. 688, 147 Mass. 349; Sheedy v. Roach, 124 Mass. 472; Thayer v. Wellington, 9 Allen, 283; Briggs v. Penny, 3 De G. & Sm. 525, 3 Macn. & G. 546.

Where devisee takes the legal title only, and not the beneficial interest, and the trust is not sufficiently defined by the will to take effect, the equitable interest goes by way of resulting trust to the heirs or next of kin. Olliffe v. Wells, 130 Mass. 225; Sears v. Hardy, 120 Mass. 541; Nichols v. Allen, 130 Mass. 211.

A clause in a will which is, in effect, a mere authority to a third person to direct how a specified sum should be disposed of is inoperative, and the sum named therein being a void bequest falls into the residue of the estate. See Bristol v. Bristol, 2 New Eng. Rep. 759, 53 Conn. 242.

Where the beneficiary dissolved its organization and ceased to be a visible church the trustees hold the estate as a resulting trust for the testator's heirs at law. Easterbrooks v. Tillinghast, 5 Gray, 17.

The devise to an unincorporated society which could not take the legal estate descended to the heirs subject to the trust which they were bound to execute. Bartlett v. Nye, 4 Met. 378; Sohier v. St. Paul's Church, 12 Met. 261.

Legislature may transfer title to cestui que trust.

The Legislature has power to "transfer the legal title from the naked trustees to the *cestui que trust*, after the latter were incorporated." Reformed Prot. Dutch Church v. Mott, 7 Paige, 77; Robertson v. Bullions, 9 Barb. 101.

Act of March, 1801, § 4, transferred to the trustees of an incorporated religious society, without any conveyance, the legal title of any real or personal property held in the name of others upon a mere naked trust, for the use of the church or congregation, or of the corporators. The Act of April 5, 1813, § 4, is a literal copy of the Act of March, 1801, § 4. Voorhees v. Presbyterian Church, 5 How. Pr. 63.

In 1638 Harvard made his donation to the school in Newtown (now Cambridge), an indefinite and perpetual succession of scholars, etc., but did not appoint any trustees, so his charity must have failed had not the Colony Legislature appointed trustees to receive and manage it; and in 1650 this Legislature acted on the principles of *cy près* (that is, executed the donor's intentions as near as could be done), and transferred this donation from an unincorporated school to Harvard College, made a body politic in 1642. So in the case of the Hopkinton lands, A. D. 1741, in which chancery had appointed trustees; our Legislature placed the charity estates in new hands,—lands given to support schools forever, among the inhabitants of a defined territory, not unincorporated, continually varying; the Legislature gave effect to the donation by Acts of incorporation. It acted on the same principles in the cases of the Ipswich school lands, A. D. 1756; Williamstown School Act, March 8, 1735; Hopeland District Act, March 7, 1791, March, 1797; Charlestown School Lands Act, June 17, 1789; Dummer's Academy Act, March 27, 1784; Derby School Act, November 11, 1784, etc.

This has been the invariable practice of our Legislature thus to appoint corporate trustees to take, hold, and manage the legal estate, since 1642. See 4 Dane, Abr. 243.

Statutes are held valid which are clearly just and reasonable and conducive to the general welfare, even though they operate in a degree upon existing rights. Ross v. Worthington, 11 Minn. 438.

A statute power must be strictly pursued, and must be pursued in the mode and form prescribed by the Act creating it, or by the Act which regulates its exercise. Curtis v. Leavitt, 15 N. Y. 189.

Charitable gifts; what are.

In British Museum v. White, 2 Sim. & Stu. 596, a charitable gift was defined to be, "Every gift for a public purpose, whether local or general, although not a charitable use within the common and narrow sense of those words."

In Jones v. Williams, Ambl. 651, *Lord* Camden gives this practical definition, viz.: "A gift to a general public use which extends to the poor as well as to the rich." This definition has been repeatedly approved by this and other courts. See Wright v. Linn, 9 Pa. 433; Coggeshall v. Pelton, 7 Johns. Ch. 294; Mitford v. Reynolds, 1 Phil. Ch. 191; Perin v. Carey, 65 U. S. 24 How. 506 (16 L. ed. 711); Jackson v. Phillips, 14 Allen, 556.

The true test of a legal public charity is the char-

In the absence of argument we see no sufficient reason for directing a scheme to be framed.

In the first place it does not appear that the will creates a public charity. It does not purport to found an institution as in *Tainter* v. *Clark*, 5 Allen, 66; *Atty-Gen.* v. *Lonsdale*, 1 Sim. 105; *Russell* v. *Allen*, 107 U. S. 163 [27 L. ed. 397]; but to give the fund to one already in existence and having a determinate character. It would seem that Mr. Curtis' medical school in fact, and the supposed corporation in the mind of the testator were neither of them free or public schools, as in *Boxford Religious Society* v. *Harriman*, 125 Mass. 321, and *Morville* v. *Fowle*, 144 Mass. 109, 4 New Eng. Rep. 39 (see *McIntire* v. *Zanesville*, 17 Ohio St. 352), but were both private pecuniary enterprises, to the support of which the trustees, that is to say the party interested, had power to apply the whole income. Such an enterprise is not a public charity even if indirectly it

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acter of the object sought to be attained, the purpose to which the gift is to be applied, not the motive of the donor. Fire Ins. Patrol v. Boyd, 120 Pa. 624, 1 L. R. A. 417, *note*.

A corporation which in the performance of its corporate duties is acting, without gain or profit, in aid and ease of the municipal government in the preservation of life and property at fires, whether as a volunteer or not, is a public charity and not subject to the doctrine of *respondeat superior*. *Ibid.*

A devise to a lodge of Odd Fellows "for the benefit of the widows and orphans" is sufficiently definite to be sustained as a charity. Heiskell v. Chickasaw Lodge, 4 L. R. A. 699; Dickson v. Montgomery, 1 Swan, 366; Green v. Allen, 5 Humph. 204; Franklin v. Armfield, 2 Sneed, 347; Frierson v. General Presby. Assembly, 7 Heisk. 694; State v. Smith, 16 Lea, 664; Gass v. Ross, 3 Sneed, 213.

If a gift is made to one charity in the first instance, and then over to another charity upon the happening of a contingency which may or may not take place within the limit of the rule, the limitation over to the second charity is good. Christ's Hospital v. Grainger, 16 Sim. 83, 1 Macn. & G. 460, 1 Hall & T. 533; McDonogh v. Murdoch, 56 U. S. 15 How. 367, 412, 415 (14 L. ed. 732); Russell v. Allen, 107 U. S. 163 (27 L. ed. 397); Storrs Agricultural School v. Whitney, 3 New Eng. Rep. 573, 54 Conn. 347; Odell v. Odell, 10 Allen, 7.

Public charitable use not presumed.

This court will not presume a public charitable use where none was declared, although the bequest was to the trustees of a religious society. Cited in 2 Pom. Eq. Jur. 585. See Gloucester v. Wood, 3 Hare, 131, 136-148; Lewis v. Allenby, L. R. 10 Eq. 668; Wilkinson v. Barber, L. R. 14 Eq. 96; Gillam v. Taylor, L. R. 16 Eq. 581; Atty-Gen. v. Eastlake, 11 Hare, 205, 215; Pocock v. Atty-Gen. L. R. 3 Ch. Div. 342; *Re* Jarman's Estate, L. R. 8 Ch. Div. 584; *Re* Williams, L. R. 5 Ch. Div. 735; *Re* Birkett, L. R. 9 Ch. Div. 576; *Re* Hedgman, L. R. 8 Ch. Div. 156; Mills v. Farmer, 1 Meriv. 55; Moggridge v. Thackwell, 7 Ves. Jr. 36; Saltonstall v. Sanders, 11 Allen, 446; Jackson v. Phillips, 14 Allen, 539; American Academy of A. & S. v. Harvard College, 12 Gray, 582; Vidal v. Girard, 43 U. S. 2 How. 127 (11 L. ed. 205); Cresson's Appeal, 30 Pa. 437; Price v. Maxwell, 28 Pa. 23, 35; Franklin v. Armfield, 2 Sneed (Tenn.) 305; Russell v. Allen, 5 Dill. 235; Boxford Sec. Relig. Society v. Harriman, 125 Mass. 321; Ould v. Washington Hospital, 95 U. S. 303 (24 L. ed. 450); Goodell v. Union Asso. 29 N. J. Eq. 32; De Camp v. Dobbins, 29 N. J. Eq. 36; Cory Univ. Society v. Beatty, 28 N. J. Eq. 570; Stevens v. Shippen, 28 N. J. Eq. 487; Clement v. Hyde, 50 Vt. 716; Craig v. Secrist, 54 Ind. 419; Mason v. Methodist Epis. Church, 27 N. J. Eq. 47; Cruse v. Axtell, 59 Ind. 49; Old South Society v. Crocker, 119 Mass. 1; Zeisweiss v. James, 63 Pa. 465.

What are not public charities.

When there is a body or a definite number of persons clearly pointed out by the terms of the gift to receive, control, and enjoy the benefits of the bequest, it is not a public charity, however carefully and exclusively the trust may be restricted to religious uses alone. Old South Society v. Crocker, 119 Mass. 23.

A devise to persons named, their heirs and assigns forever, and to the survivor of them and his heirs forever, in trust to manage and appropriate such part of the principal and interest as they may deem best in aid and support of my children and their descendants who may be destitute, is not a public charity and is invalid. Kent v. Dunham, 2 New Eng. Rep. 655, 142 Mass. 216.

A cemetery corporation which voluntarily uses its funds for objects akin to the purposes of its organization, is not a public charity. Donnelly v. Boston Catholic Cemetery Asso. 5 New Eng. Rep. 741, 146 Mass. 163.

Gifts to trustees to be applied "for benevolent purposes" at their discretion, or "to such benevolent purposes" as they shall agree upon, do not create a public charity (Chamberlain v. Stearns, 111 Mass. 267; James v. Allen, 3 Meriv. 17; Norris v. Thomson, 19 N. J. Eq. 397; Thomson v. Norris, 20 N. J. Eq. 489); as a bequest to my executors and the survivor of them, or their successors, to be by them distributed to such persons, societies, or institutions as they may consider most deserving. Nichols v. Allen, 130 Mass. 211.

A peculiar bequest for the establishment of a dispensary was held not sustainable as a charitable use. See Beekman v. People, 27 Barb. 260.

A bequest for the distribution of books, in which the author describes the system by which the land owners of the country hold the title to their lands as robbery, is not such a charity as the courts will enforce. See Hutchins v. George, 12 Cent. Rep. 252, 44 N. J. Eq. 124.

A bequest to an infidel society hereafter to be incorporated is void, not being for a charitable use. See Zeisweiss v. James, 63 Pa. 465.

A mutual aid society is not a charity. See Babb v. Reed, 5 Rawle, 151; Swift v. Easton Beneficial Soc. 73 Pa. 362.

Nor are "Friendly Societies." See *Re* Clark's Trust, L. R. 1 Ch. Div. 497; Pease v. Pattinson, L. R. 32 Ch. Div. 154.

The bequest for the erection of monuments to the memory of certain persons is valid; but the bequest for assisting to raise monuments to the memory of all other officers and soldiers from the State who distinguished themselves is void on account of the impossibilty of its performance. Gilmer v. Gilmer, 42 Ala. 23.

Chancery jurisdiction over charitable trust.

Chancery exercised jurisdiction over charitable trusts antecedent to the Statute of Elizabeth; and although this statute was never in force in Pennsylvania, yet the common law of that State had always recognized the chancery jurisdiction in cases of charity. Yates v. Yates, 9 Barb. 336; Vidal v. Girard, 43 U. S. 2 How. 127 (11 L. ed. 205). See Fire Ins. Patrol v. Boyd, 1 L. R. A. 417, *note*, 120 Pa. 624, 626.

Independently of the Statute of Elizabeth, courts of equity favor the doctrine of trusts for charitable purposes, and exercise original and plenary jurisdiction over them, and may maintain and enforce

serves charitable ends. *Atty-Gen.* v. *Hewer*, 2 Vern. 387; *Atty-Gen.* v. *Newcombe*, 14 Ves. Jr. 1, 7; *Atty-Gen.* v. *Haberdashers' Co.* 1 Myl. & K. 420. See *Drury* v. *Natick*, 10 Allen, 169, 180; *Carne* v. *Long*, 2 De G. F. & J. 75, 79; *Thomson* v. *Shakespear*, 1 De G. F. & J. 399, 406, 408.

If the will allowed the fund to be applied to purposes not charitable, the gift fails as a charity. *Rotch* v. *Emerson*, 105 Mass. 431, 433; *Saltonstall* v. *Sanders*, 11 Allen, 446, 464; *Morice* v. *Bishop of Durham*, 9 Ves. Jr. 399, 406; *Ellis* v. *Selby*, 1 Myl. & Cr. 286, 299.

In the next place we think that it appears from the facts that the gift is primarily to the trustees of the college; and that the college is in another State; that the income is to be used by the college and that the whole of it may be used for its own support in the discretion of the trustees, as well as from the circumstances

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them by their own powers. Williams v. Pearson, 38 Ala. 299; LaGrange County v. Rogers, 55 Ind. 297; Howard v. American Peace Society, 49 Me. 288; Reformed Prot. Dutch Church v. Mott, 7 Paige, 77; Miller v. Atkinson, 63 N. C. 537; Sowers v. Cyrenius, 33 Ohio St. 29; Dodge v. Williams, 46 Wis. 91.

There need not be any legally existing institution to receive the gift, but the object or purpose of the gift must be specified. Norris v. Thompson, 19 N. J. Eq. 314; Williams v. Williams, 8 N. Y. 547; Owens v. Missionary Society of M. E. Church, 14 N. Y. 397; Beekman v. Bonsor, 23 N. Y. 298.

The beneficiaries must necessarily be described in the will or gift in general terms. Coit v. Comstock, 51 Conn. 377.

It is their number and the indefiniteness of the object which is the essential element which constitutes a charity. Newson v. Starke, 46 Ga. 93; Simpson v. Welcome, 72 Me. 501; Saltonstall v. Sanders, 11 Allen, 456; Burr v. Smith, 7 Vt. 241.

According to the law of England as understood at the time of the American Revolution, and as it exists at this day, conveyances, devises, and bequests for the support of charity or religion, though defective for the want of such a grantee or donee as the rules of law require in other cases, would be supported and established in the court of chancery. Kennedy v. Palmer, 1 Thomp. & C. 584, *note*. See Williams v. Williams, 8 N. Y. 541; *Re* Christ's College, 1 W. Bl. 90; Going v. Emery, 16 Pick. 107; Burr v. Smith, 7 Vt. 241; McCartee v. Orphan Asylum Society, 9 Cow. 437; Philadelphia Baptist Asso. v. Hart, 17 U. S. 4 Wheat. 1 (4 L. ed. 499); Vidal v. Girard, 43 U. S. 2 How. 127 (11 L. ed. 205); Inglis v. Sailors' Snug Harbor, 28 U. S. 3 Pet. 99 (7 L. ed. 617).

A full grant of equity powers carries all the powers which are exercised by the English chancery courts acting within their regular jurisdiction. Pell v. Mercer, 14 R. I. 438.

Funds supplied from the gift of the Crown, or from the gift of the Legislature, or from private gift, for any legal, public or general purpose, are charitable funds to be administered by courts of equity. See Nightingale v. Goulburn, 5 Hare, 484, 486; Dolan v. Macdermot, L. R. 5 Eq. 60, L. R. 3 Ch. 676; Atty-Gen. v. Earl of Lonsdale, 1 Sim. 105; Atty-Gen. v. Webster, L. R. 20 Eq. 483; Drury v. Natick, 10 Allen, 169; Townley v. Bedwell, 6 Ves. Jr. 194.

If the gift be charitable it is good, however general. Morice v. Bishop of Durham, 9 Ves. Jr. 405; Horde v. Earl of Suffolk, 2 Myl. & K. 59; Waldo v. Caley, 16 Ves. Jr. 206; Perry, Trusts, § 706 and cases cited; Bispham, Eq. § 119. See also R. I. Pub. Stat. chap. 178, § 6; Pell v. Mercer, 14 R. I. 445.

Courts of equity may exercise the cy près power.

There is no branch of the law which has been more diligently explored than that which relates to charitable uses and to the exercise of the *cy près* power. The result has been to create or confirm the belief that the power, apart from the prerogative power, is a regular chancery power, and that there is no reason why any court, invested with full chancery powers, and untrammeled by precedent or legislation, should not assume and exercise it. The progress of this belief in the Supreme Court of the United States is very instructive. Phila. Baptist Asso. v. Hart, 17 U. S. 4 Wheat. 1 (4 L. ed. 499; Vidal v. Girard, 43 U.S. 2 How. 127 (11 L. ed. 205); Russell v. Allen, 107 U. S. 163 (27 L. ed. 387).

The Supreme Judicial Court of Massachusetts has accepted it with hearty faith (see Jackson v. Phillips, 14 Allen, 539, 574; Tainter v. Clark, 5 Allen, 66; Going v. Emery, 16 Pick. 119); and it is part of the common law of that State. Dexter v. Gardner, 7 Allen, 246.

There are other States in which the same view has prevailed. Estate of Hinckley, 58 Cal. 457; Academy of the Visitation v. Clemens, 50 Mo. 167; Erskine v. Whitehead, 84 Ind. 357; Houser v. Harris, 42 Ill. 425; Hesketh v. Murphy, 36 N. J. Eq. 334; Clement v. Hyde, 50 Vt. 716; Bispham, Eq. § 150; Pell v. Mercer, 14 R. I. 436.

The courts of Kentucky carry out the *cy près* doctrine in cases of uncertain trustees and objects. Cromie v. Louisville Orphans Home Soc. 3 Bush, 365; Baptist Church v. Presbyterian Church, 18 B. Mon. 635; Hadden v. Chorn, 8 B. Mon. 70; Atty-Gen. v. Wallace, 7 B. Mon. 611; Moore v. Moore, 4 Dana, 354; Gass v. Wilhite, 2 Dana, 170; Curling v. Curling, 8 Dana, 38.

The Supreme Court of Rhode Island, having full chancery powers by statute, has so much of the *cy près* power as is exercised by English chancery, without recourse to the prerogative powers delegated to it in particular cases by the sign manual of the Crown. Pell v. Mercer, 14 R. I. 412.

In this State there is no reported decision in which the doctrine of *cy près* has been adopted, though the decision in Brown v. Meeting Street Baptist Society, 9 R. I. 177, rests upon the principles which lie at the foundation of the doctrine. There are, however, unreported cases in which the doctrine has been recognized or applied. The earliest of these is the case of Gardiner v. Kingston Academy (decided in Washington County in 1840), cited in Pell v. Mercer, 14 R. I. 437.

In one case an ancient charity which had ceased to be useful as originally founded was applied to other purposes; and in another case a charity which could not be carried out as intended by the founder was settled in a different manner. St. Michael's Church v. Sayles (Bristol County, May, 1882), and Atty-Gen. v. Newport (Newport County, March Term, 1882), cited in Pell v. Mercer, 14 R. I. 437, affirmed in R. I. Hospital Trust Co. v. Olney, 14 R. I. 449.

In Pell v. Mercer, *supra*, it was held that the bequest should be paid to the Townsend Aid for the Aged, in Newport, as most closely corresponding to the designation in the will. Pell v. Mercer, 14 R. I. 412.

In Peckham v. Newton, 2 New Eng. Rep. 508, 15 R. I. 321, the bequest was made to the "Home for the Aged, a benevolent association in said Newport," when there was no such association.

Chancery will sustain dedications to public charities.

Where the fund was dedicated to the inhabitants of the village for a schoolhouse, as a donation or gift to a public charity, it is a dedication to a public use. Potter v. Chapin, 6 Paige, 639; Mowry v. Providence, 10 R. I. 56.

under which the will was made; that the main object is the support of the particular institution which the testator had in mind; and that the promotion, in Ohio, of Thomsonism, the form of medical art believed in by the testator, was to be accomplished as incident to that object. It is immaterial to this conclusion whether the name described an existing beneficiary or not. At least it described an institution which was supposed by the testator to exist and of which his friend was supposed to be an officer.

The testator's belief as to facts has the same effect upon the construction of his language, whether his belief was right or mistaken. Then, if the foregoing construction of the will is not strict, even if the gift were to a public charity, probably the gift would fail upon the failure of the donee. The main doubt, if it were conceded that the gift was charitable, would arise on the

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Property in some cases may be granted or dedicated to the use of a body incapable of holding in its own right. Robertson v. Bullions, 9 Barb. 79; Hartford Baptist Church v. Witherell, 3 Paige, 296.

The court of chancery will sustain and protect a dedication of personal property to public or charitable uses, provided the same is consistent with local laws and public policy, when the object of the gift or dedication is specific and capable of being carried into effect according to the intention of the donor. Downing v. Marshall, 23 How. Pr. 29.

Although a donation was given to no one by name, nor for any particular children or inhabitants, yet it was held a gift for a public charity, which this court would sustain. And on the school becoming incorporated, the estate vested in the corporation. Shotwell v. Mott, 2 Sandf. Ch. 57. See Moggridge v. Thackwell, 7 Ves. Jr. 36; Wellbeloved v. Jones, 1 Sim. & Stu. 40.

Upon the united church becoming incorporated, all their united and consolidated property became vested in the corporation. Cammeyer v. United German Lutheran Churches, 2 Sandf. Ch. 21.

Valid trust not to fail for want of a trustee.

The court will not allow a valid trust to fail for want of a trustee. Fellows v. Miner, 119 Mass. 545; Chamberlain v. Chamberlain, 43 N. Y. 424; Washburn v. Sewall, 9 Met. 280; Sohier v. St. Paul's Church, 12 Met. 250; Atty-Gen. v. London, 3 Bro. Ch. 171; Mayor of Lyons v. East India Co. 1 Moore, P. C. 295; Atty-Gen. v. Sturge, 19 Beav. 597.

If no trustee is named in the will, equity will appoint trustees to execute the trust upon a bill filed by the beneficiaries. First Universalist Society v. Fitch, 8 Gray, 421.

In the ordinary case of trusts for such persons of a class as the trustee shall select, when a duty to select is imposed upon the trustee by implication, a general intention to benefit the class is recognized and the trust will not fail if the trustee accepts it and then fails to make a selection. Minot v. Baker, 6 New Eng. Rep. 688, 147 Mass. 350; Drew v. Wakefield, 54 Me. 291.

Where a duty was imposed on the trustee to act, it is a strong circumstance in favor of the construction that the benefit is not intended to be made dependent on his acting. Brown v. Higgs, 8 Ves. Jr. 561; Cole v. Wade, 16 Ves. Jr. 27; Moggridge v. Thackwell, 7 Ves. Jr. 82.

Enforcement of charitable trusts.

A court of chancery has original jurisdiction to enforce and compel the performance of trusts for pious and charitable uses, when the devise or conveyance in trust is made to a trustee capable of taking the legal estate. Drew v. Wakefield, 54 Me. 288.

If trustees have once accepted the gift, they may be compelled to apply it to the destined purposes. American Academy of Arts and Sciences v. Harvard College, 12 Gray, 555; Atty-Gen. v. Andrew, 3 Ves. Jr. 646.

The court had a free and extensive jurisdiction and was not confined to foreign methods of proceeding requisite in other cases. Atty-Gen. v. Gleg, 1 Atk. 356.

Jurisdiction was exercised irrespective of the circumstances whether the trustees were a corporation or individuals, and whether the gift was to trustees by name, or merely for an object sufficiently definite and specific to be carried into effect. Shotwell v. Mott, 2 Sandf. Ch. 50.

The same power which is vested in the Crown, touching parties under the disability of infancy and lunacy, embraces the cases of property given for the purposes of charity, and it is vested in the sovereign in the same paternal character. *Re* New York P. E. Public School, 31 N. Y. 502.

A charity being a trust in which the public is interested, and which is allowed by the law to be perpetual, "deserves and often requires the exercise of a larger discretion by the court of chancery than a mere private trust." Jackson v. Phillips, 14 Allen, 539; Minot v. Baker, 6 New Eng. Rep. 688, 147 Mass. 352.

Where the departure from the exact intent of the testator is only as to the mode of carrying out his cherished object, not a substitution of one object for another, there is nothing of the *cy près* doctrine in it. Bristol v. Bristol, 2 New Eng. Rep. 759, 53 Conn. 260. See 2 Pom. Eq. Jur. 596; Starkweather v. American Bible Soc. 72 Ill. 50; Heuser v. Harris, 42 Ill. 425; Gilman v. Hamilton, 16 Ill. 225; Heiss v. Murphey, 40 Wis. 276.

Court may require trustee to execute the trust.

Where no trustee has been appointed to carry the trust into effect, the executor or the heir at law becomes trustee, and may be compelled by the court of equity to execute the trust, or the court will appoint a trustee. Brown v. Kelsey, 2 Cush. 243; Bartlett v. Nye, 4 Met. 380; Washburn v. Sewall, 9 Met. 280; Tainter v. Clark, 5 Allen, 66; Sanderson v. White, 18 Pick. 330.

The general power of the court to carry out the provisions of a will *cy près*, in case of donations to charitable uses, is well established. Burbank v. Whitney, 24 Pick. 146; Going v. Emery, 16 Pick. 107; Sanderson v. White, 18 Pick. 328; Bartlett v. Nye, 4 Met. 378; Mayor v. Nixon, 2 Younge & J. 60; Moggridge v. Thackwell, 7 Ves. Jr. 82; 1 Story, Eq. §§ 94, 95; 2 Story, Eq. §§ 1060, 1061, 1187, 1190, 1191; Lewin, Tr. 423.

When a trustee, directed by a decree of court settling a charitable bequest *cy près* to pay over the trust fund to a particular object, shows by his language and acts that he will not exercise the discretion because he believes another apportionment will better conform to the intention of the testator, he will be removed. Atty-Gen. v. Garrison, 101 Mass. 223.

To warrant a deviation from the plain directions of the will as to the mode of election of trustees an exigency must exist, and where the power of the judge of probate to appoint the first meetings of the towns was limited to one year, and the year expired before such appointments were made, the electors chosen thereafter were not legally constituted a board of trustees. Baker v. Smith, 13 Met. 34; Northampton v. Smith, 11 Met. 390.

General intention of testator to govern.

The existence of a judicial power to administer a

question of construction. In such cases courts have gone very far in discovering and sustaining a general charitable intent distinct from the means indicated for carrying it out or the immediate object. *Incorporated Society for Protestant Schools* v. *Price*, 1 Jones & La T. 498, 7 Ir. Eq. 260, and other cases cited in *Jackson* v. *Phillips*, 14 Allen, 539.

Thus, in case of a simple gift to an institution, if the institution is in its nature, and by its name appears to be, a mere trustee or conduit for the application of its funds to charitable purposes, the gift will not fail upon failure of the donee. *Winslow* v. *Cummings*, 3 Cush. 358; *Bliss* v. *Am. Bible Society*, 2 Allen, 334; *Old South Society* v. *Crocker*, 119 Mass. 1, 24. See *Re Maguire*, L. R. 9 Eq. 632.

So *a fortiori*, if the objects of the charitable

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charity *cy près*, where the expressed intention of the founder cannot be exactly carried out, has been either countenanced, or left an open question in all the New England States except Connecticut. See Burr v. Smith, 7 Vt. 287, 288; Second Congregational Society v. First Congregational Society, 14 N. H. 330; Brown v. Concord, 33 N. H. 206; Derby v. Derby, 4 R. I. 439; Tappan v. Deblois, 45 Me. 131; Howard v. American Peace Society, 49 Me. 302; Treat's App. 30 Conn. 113; M'Cord v. Ochiltree, 8 Blackf. 15; Beall v. Fox, 4 Ga. 427; Chambers v. St. Louis, 29 Mo. 590; Lepage v. McNamara, 5 Iowa, 146; McIntyre v. Zanesville, 17 Ohio St. 352.

Where there is a clear intention on the part of the donor to devote his gift to charity, and no object is mentioned, or the particular object mentioned fails, the court will execute the trust *cy près* and apply the fund to some similar object, even though the particular mode of operation contemplated by the donor is uncertain or impracticable and notwithstanding the indefiniteness, illegality, or failure of its immediate objects. See Atty-Gen. v. Baxter, 1 Vern. 248; Hayter v. Trego, 5 Russ. 113; Simon v. Barber, 5 Russ. 112; Atty-Gen. v. Glyn, 12 Sim. 84; Bennett v. Hayter, 2 Beav. 81; Loscombe v. Wintringham, 13 Beav. 87; Atty-Gen. v. Andrew, 3 Ves. Jr. 635; Corbyn v. French, 4 Ves. Jr. 418; Atty-Gen. v. Bishop of Oxford, 4 Ves. Jr. 431; Cary v. Abbot, 7 Ves. Jr. 490; Atty-Gen. v. Ironmongers' Co. 10 Clark & F. 908; Atty-Gen. v. Marchant, L. R. 3 Eq. 424; Atty-Gen. v. Bunce, L. R. 6 Eq. 563; *Re* Latymer, L. R. 7 Eq. 353; *Re* Maguire, L. R. 9 Eq. 632; Merchant Tailors Co. v. Atty-Gen. L. R. 11 Eq. 35; *Re* Prison Charities, L. R. 16 Eq. 129; Atty-Gen. v. St. John's Hospital, L. R. 1 Ch. 92, L. R. 2 Ch. 554; Manchester School Case, L. R. 2 Ch. 497; Atty-Gen. v. Wax Chandlers' Co. L. R. 5 Ch. 503; Sinnett v. Herbert, L. R. 7 Ch. 232; Atty-Gen. v. Duke of Northumberland, L.R. 7 Ch. Div. 745; Chamberlayne v. Brockett, L. R. 8 Ch. 206; 2 Pom. Eq. Jur. 595.

Where a surplus accrues from an increase in value of the subject dedicated, the increased profits go to the charity holding the estate whence these profits issue. See Thetford School Case, 8 Coke, 130 *b*.

In such case the plain, implied intention of the testator necessarily excludes the heir from any resulting trust in his favor to the increased rents and profits. See Atty-Gen. v. Wilson, 3 Myl. & K. 372; Atty-Gen. v. Sparks, 1 Amb. 201; Atty-Gen. v. Johnson, Amb. 190; Atty-Gen. v. Drapers Co. 2 Beav. 508; Atty-Gen. v. Tonner, 2 Ves. Jr. 1; Atty-Gen. v. Wansay, 15 Ves. Jr. 231.

In such cases the surplus is distributed *cy près*. See Atty-Gen. v. Green, 2 Bro. Ch. 492.

But where it is the intention of the donor to limit his benefits to a certain place or class, the rule does not apply. See Atty-Gen. v. Brandreth, 1 Younge, & C. (Ch.) 200; Atty-Gen. v. Rochester, 5 DeG. M. & G. 797.

So if the profits decrease the charity must bear the loss. See Atty-Gen. v. Sparks, Amb. 202; Manchester School Case, L. R. 1 Eq. 55, L. R. 2 Ch. 497; Berkhampstead School Case, L. R. 1 Eq. 102.

Where the limitation is imperfect by reference to directions in the codicil which were never given, the court will appoint *cy près* where the bequest would indicate a general charitable intention, sufficient to give it effect, or would assume the office of executor. See Baylis v. Atty-Gen. 2 Atk. 239; Cook v. Duckenfield, 2 Atk. 562; Mills v. Farmer, 1 Meriv. 55.

But where there is no general intention, but only a particular intention, if that fails the gift fails; so where the trust could never take effect in any other way than that directed it could not be applied to another charitable object. See Atty-Gen. v. Bishop of Oxford, 1 Bro. Ch. 444, *note*; Anonymous, Freem. Ch. 261; Cherry v. Mott, 1 Myl. & C. 123; Clark v. Taylor, 1 Drew, 642; Russell v. Kellett, 3 Smale & G. 264; Langford v. Gowland, 3 Giff. 617; Clephane v. Lord Provost of Edinburgh, L. R. 1 H. L. Sc. 417; *Re* Clark's Trust, L. R. 1 Ch. Div. 497; Fisk v. Atty-Gen. L. R. 4 Eq. 521.

Scheme may be devised to carry out trust.

If there is a competent trustee, although there is no ascertained or ascertainable beneficiary, the gift may be upheld, if the charitable use is so clearly and certainly defined as to be capable of being specially executed and enforced. See Goddard v. Pomeroy, 36 Barb. 546.

On a gift of the residue of the estate to his executor "to be disposed of by him for such charitable purposes as he shall think proper," and the executor died without disposing thereof, it was held that the will created a valid trust for charitable purposes, and that the court would frame a scheme to carry out the trust. Minot v. Baker, 6 New Eng. Rep. 688, 147 Mass. 348; White v. Ditson, 1 New Eng. Rep. 485, 140 Mass. 353; *Re* Schouler, 134 Mass. 426; Wells v. Doane, 3 Gray, 201; Everett v. Carr, 59 Me. 325.

But the court is not at liberty to alter the scheme of the testator either as to the objects of the charity or the agents by whom it is to be administered, unless it appears to be impossible to carry out his scheme according to its terms. Baker v. Smith, 13 Met. 41; Smith Charities v. Northampton, 10 Allen, 501; Harvard College v. Society for Promoting Theolog. Education, 3 Gray, 280; Jackson v. Phillips, 14 Allen, 591.

Object of charity cannot be changed.

American courts apply *cy près* rules in effectuating the especial design of the testator, though not in diverting his charity to other objects than those specified in the will. See Gilman v. Hamilton, 16 Ill. 225.

In Kentucky, where an object is pointed out, and a particular mode indicated which happens to fail, equity may sanction or substitute any other mode that may be lawful or suitable, but it cannot declare an object for the donor. It is there held that "the court acts judicially as long as it effectuates the lawful intention of the donor, but it does not so act when it applies his bounty to a specific object of charity selected by itself, merely because he had to dedicate it to charity generally." See Moore v. Moore, 4 Dana, 366.

Beneficiaries uncertain.

It is the very uncertainty of the beneficiaries which gives jurisdiction in chancery. State v

trust are declared by the will, and it appears that the discretion of the particular societies named is not of the essence of the gift. *Reeve* v. *Atty-Gen.* 3 Hare, 191, 197; *Marsh* v. *Atty-Gen.* 2 Johns. & H. 61.

But if the construction of the will is settled in the sense in which we have construed the one before us, then if the donee fails, the gift fails. To that extent at least we may follow the late English cases with safety and without encountering the doubts expressed in *Jackson* v. *Phillips*, 14 Allen, 594 and 1 Jarm. Wills, 4th ed. 456, 457 (*Clark* v. *Taylor*, 1 Drew. 642; *Russell* v. *Kellett*, 3 Smale & G. 264; *Marsh* v. *Means*, 5 Week. Rep. 815, 3 Jur. N. S. 790; *Langford* v. *Gowland*, 3 Giff. 617; *Fisk* v. *Atty-Gen.* L. R. 4 Eq. 521; *Re Maguire, ubi supra; Minot* v. *Baker*, 147 Mass. 348, 349, 350, 6 New Eng.

Griffith, 2 Del. Ch. 392; Chambers v. St. Louis, 29 Mo. 589.

Property may be bequeathed or conveyed in trust for charitable uses and purposes for the benefit of uncertain classes, such as "the poor," "the children," etc., where there is no statute inhibiting the same; and if the purposes are charitable within the meaning of that term, the trust falls within the jurisdiction of equity and will be enforced. See Cottman v. Grace, 3 L. R. A. 149, *note*, 112 N. Y. 299.

A direction that the whole estate should "be used at discretion by the acting selectmen of B for the special benefit of the worthy, deserving, poor, white, American, Protestant, Democratic widows and orphans, residing in B, until all is expended," was held not to be void for uncertainty. Beardsley v. Bridgeport, 1 New Eng. Rep. 639, 53 Conn. 489.

A provision in a will that the income of a certain fund shall be applied for the relief of the most destitute of the testator's relatives is not void for uncertainty, but a charitable trust is thereby created, to be executed by the executor according to his discretion, under the supervision of the court. Gafney v. Kenison, 5 New Eng. Rep. 81, 64 N. H. 354.

The gift "to aid indigent young men in fitting themselves for the evangelical ministry," was held not to be void for uncertainty. Storrs Agricultural School v. Whitney, 3 New Eng. Rep. 573, 54 Conn. 342.

Although no particular person or persons are named who may demand execution of the trust, yet the court will not suffer the gift to fail when it can be made certain. McLain v. White Twp. School Directors, 51 Pa. 199; Zeisweiss v. James, 63 Pa. 468; Perry, Tr. § 732.

Where a charitable gift is made to or concerns an indefinite class of persons, the court will endeavor to ascertain a more particular intention and limit its operation accordingly. See Atty-Gen. v. Clarke, Amb. 422; Atty-Gen. v. Combe, 2 Ch. Cas. 18; Brantham v. East Burgold, cited in 2 Ves. Jr. 388; Atty-Gen. v. Oglander, 3 Bro. Ch. 166.

Where beneficiary ascertainable.

If a rule is given by which the persons can be described, if not with entire certainty, yet sufficiently so to uphold the devise, and if it can by possibility be upheld, it can never be pronounced void. Bull v. Bull, 8 Conn. 50; Coit v. Comstock, 51 Conn. 379.

It is sufficient if the legatees are so described that they can be ascertained and known when the right to receive the legacy accrues. Holmes v. Mead, 52 N. Y. 332; Coit v. Comstock, 51 Conn. 379.

The rule is that a misnomer of the legatee or devisee is immaterial, if the person intended can be identified by the description in the will. 1 Jarman, Wills, 5th Am. ed. 760, *note*; Button v. American Tract Soc. 23 Vt. 336; Straw v. East Maine Conference M. E. Church, 67 Me. 493; South Newmarket Meth. Seminary v. Peaslee, 15 N. H. 317; Newell's App. 24 Pa. 197; Maund v. McPhail, 10 Leigh, 169; Pell v. Mercer, 14 R. I. 447.

Legatees, even though wrongly named, will take, upon its being proved that they were the intended persons. Benson v. Whittam, 2 Sim. 493; Minot v. Boston Asylum and Farm School, 7 Met. 416; Tucker v. Seaman's Aid Society, 7 Met. 188. See Cottman v. Grace, 3 L. R. A. 145, *note*, 112 N. Y. 299; Fire Ins. Patrol v. Boyd, 1 L. R. A. 417, *note*, 120 Pa. 624.

Where a legacy was left to a society by name, evidence will be admitted to show what association was meant. See *Re* Maguire, L. R. 9 Eq. 632.

Where there were two claimants and nothing to show a preference, and they both claimed, the legacy was divided. See Bennett v. Hayter, 2 Beav. 81; Simon v. Barber, 5 Russ. 112; *Re* Kilvert's Trusts, L. R. 12 Eq. 183.

But a slight indication of preference will suffice to turn the scale. See Atty-Gen. v. Hudson, 1 P. Wms. 674.

Selection of beneficiary.

Indefiniteness is of the essence of a public charity requiring the power to select the beneficiaries to be lodged in the court of chancery. Vezey v. Jamson, 1 Sim. & Stu. 71; Ellis v. Selby, 1 My. & C. 286; Philadelphia v. Fox, 64 Pa. 182.

The charitable object required to be named may be a benefit to a class of persons, and therefore uncertain as to the particular persons of the class that are to receive the benefit. This uncertainty may make the bequest void, unless there is a power given to some person or corporation to make a selection of the individuals. See Bristol v. Bristol, 2 New Eng. Rep. 763, 53 Conn. 242; White v. Fisk, 22 Conn. 50; Adye v. Smith, 44 Conn. 70; Fairfield v. Lawson, 50 Conn. 513; Coit v. Comstock, 51 Conn. 371; Tappan's App. 52 Conn. 412.

The uncertainty that must exist in such cases is reduced to certainty if a definite class of beneficiaries is described and a mode is provided for the selection of the particular objects of the bounty. *Id certum est quod certum reddi potest.* Coit v. Comstock, 51 Conn. 379.

In the ordinary case of trusts for such persons of a class as a trustee shall select, when a duty to select is imposed upon the trustee by implication, a general intention to benefit the class is recognized, and the trust will not fail if the trustee accepts it and then fails to make a selection. Brown v. Higgs, 4 Ves. Jr. 708, 5 Ves. Jr. 495, 8 Ves. Jr. 561; Burrough v. Philcox, 5 My. & Cr. 72; Penny v. Turner, 2 Phill. Ch. 493; Harding v. Glyn, 1 Atk. 469; Mahon v. Savage, 1 Sch. & Lef. 111; Spring v. Biles, 1 Sch. & Lef. 113, *note*, 1 T. R. 435, *note*. Salisbury v. Denton, 3 Kay & J. 529; Nichols v. Allen, 130 Mass. 211, 219; Drew v. Wakefield, 54 Me. 291; Minot v. Baker, 6 New Eng. Rep. 688, 147 Mass. 350.

Relief must be administered according to the judgment and discretion of those who must select the objects of the donor's bounty. Beaver v. Filson, 8 Pa. 327.

If the charity is general and indefinite, and no plan or scheme is prescribed, and no discretion is given to select the beneficiaries, it does not admit of judicial administration. The will should prescribe some mode of selection or give some person the discretionary power to select. Fairfield v. Lawson, 50 Conn. 513; Beardsley v. Bridgeport, 1 New Eng. Rep. 639, 53 Conn. 491; White v. Fisk, 22 Conn. 53; Grimes v. Harmon, 35 Ind. 198; Reformed Prot. Dutch Church v. Mott, 7 Paige, 77; Inglis v. Sailors Snug Harbor, 28 U. S. 3 Pet. 99 (7 L. ed. 617).

Beneficiary not in being.

Where the use was a charitable one, a court of

Rep. 688. See *Cherry* v. *Mott*, 1 Myl. & Cr. 123, 133; *Smith* v. *Oliver*, 11 Beav. 481; *Coldwell* v. *Holme*, 18 Jur. 396, 397; Tudor, Charitable Trusts, 2d ed. 225 *et seq.*); and even if the donee is in existence at the date of the will, there is no absolute rule of law that prevents the charity terminating when the donee ceases to exist, although no doubt in such cases courts have gone still further in straining the meaning of wills, in order to uphold the supposed general intent. *Clark* v. *Taylor* and *Russell* v. *Kellett*, *ubi supra*. See *Easterbrooks* v. *Tillinghast*, 5 Gray, 17; *Baker* v. *Clarke Inst. for Deaf Mutes*, 110 Mass. 89, 91.

The favor shown to charities should not be carried to the point of overriding the plainly

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equity, having ascertained the intent of the grantor, will not allow the grant to fail because there was no one *in esse* at the time of making the donation capable of being the recipient of the trust, but will see to its effectuation. Schmidt v. Hess, 60 Mo. 595. See St. Louis County Ct. v. Griswold, 58 Mo. 175; 2 Story, Eq. §§ 1165, 1166. See Fire Ins. Patrol v. Boyd, 1 L. R. A. 417, 120 Pa. 624.

A gift to a corporation not yet created is valid. Ould v. Washington Hospital, 95 U. S. 303 (24 L. ed. 450; Cory Universalist Society v. Beatty, 28 N. J. Eq. 570; Laird v. Bass, 50 Tex. 412; Cruse v. Axtell, 50 Ind. 49; *contra*, Goodell v. Union Asso. 29 N. J. Eq. 32; Heiss v. Murphey, 40 Wis. 276.

A bequest to the "Marine Bible Society" was sustained though no society of that name was in existence at the time of testator's death, where such a society was in existence at the time of making the will. Winslow v. Cummings, 3 Cush. 359.

Although in consequence of the nonincorporation of the church there was no one *in esse* at the time of making the donation capable of being the recipient of the trust, yet, the use being a charitable one, a court of equity having ascertained the intent of the grantor will not allow the grant on that account to fail, but will see to its effectuation. Schmidt v. Hess, 60 Mo. 595; St. Louis County Ct. v. Griswold, 58 Mo. 175, 2 Story, Eq. § 1165; Dexter v. Gardner, 7 Allen, 246; Earle v. Wood, 8 Cush. 430; Carpenter v. Historical Society, 1 Dem. 607.

From the number of such societies selected as objects of his benevolence, the fact of their being voluntary organizations was no reason why they should not participate in his bounty. Betts v. Betts, 4 Abb. N. C. 428.

Such bequests are not void for uncertainty, but are available for the individuals then composing such associations, and not to their successors. Bartlet v. King, 12 Mass. 537. See Cottman v. Grace, 3 L. R. A. 145, *note*, 112 N. Y. 299.

Bequests for pious and charitable uses valid.

The legality of bequests for pious and charitable uses, though for the benefit of unincorporated associations was formerly upheld in New York. Banks v. Phelan, 4 Barb. 80; Hornbeck v. American Bible Society, 2 Sandf. Ch. 133; King v. Woodhull, 3 Edw. Ch. 79; Wright v. Methodist Episcopal Church, 1 Hoffm. Ch. 202. But the later cases hold such a bequest void even if the association subsequently becomes incorporated. Owens v. Missionary Soc. 14 N. Y. 380; Downing v. Marshall, 23 N. Y. 366; Holland v. Alcock, 108 N. Y. 312, 11 Cent. 861.

Where some of the beneficiaries were incorporated it was held valid, and, on the death of the testator the legal estate vested in the executor in trust. Burbank v. Whitney, 24 Pick. 146.

Parties not in esse; executors and trustees as their legal representatives.

The executors and trustees must be considered as the legal representatives of the persons not yet *in esse*; and they are necessary parties. Lorillard v. Coster, 5 Paige, 172; McArthur v. Scott, 113 U. S. 340 (28 L. ed. 1015.)

Where there is a mixed trust of real and personal estate, it frequently becomes necessary for the court to settle questions as to the validity and effect of contingent limitations and executory devises, in a will, to persons who are not *in esse*, in order to make a final decree in the suit, and to give the proper instructions and directions to the executors and trustees in relation to the execution of their trust. Bowers v. Smith, 10 Paige, 200.

A suit may proceed against those in being holding the prior estate, and a judgment or decree against the latter binds the former in all respects as if they were *in esse* and parties to the suit. Especially is this so when the former are before the court by representation—that is, where the rights and interests which those not *in esse* would have if then *in esse* are the same with those of parties in being and before the court. McArthur v. Allen, 3 Fed. Rep. 320; Giffard v. Hort, 1 Sch. & Lef. 408; Mead v. Mitchell, 17 N. Y. 210; Baylor v. Dejarnette, 13 Gratt. 152; Faulkner v. Davis, 18 Gratt. 651; Powell v. Wright, 7 Beav. 444–449; Palmer v. Flower, L. R. 13 Eq. 250, 1 Moak, 664; Basnett v. Moxon, L. R. 20 Eq. 182, 13 Moak, 716; Wills v. Slade, 6 Ves. Jr. 498; Lloyd v. Johnes, 9 Ves. Jr. 37–52.

That persons whose interests seem to be identical with that of the "unknown heirs" were parties to the bill, was all that was required. Regan v. West, 2 West. Rep. 844, 115 Ill. 603; Finch v. Finch, 2 Ves. Sr. 491; Hopkins v. Hopkins, 1 Atk. 590; Clarke v. Cordis, 4 Allen, 475.

Uncertainty in object of charity.

The general principles thought most reconcilable to the cases is that where the execution of the trust is to be by a trustee with general objects or some objects pointed out, the court will take the administration of the trust. See Moggridge v. Thackwell, 7 Ves. Jr. 86.

So where a trustee declined to act (see Doyley v. Atty-Gen. 2 Eq. Cas. Abr. 195, c. 15; Paice v. Archbishop of Canterbury, 14 Ves. Jr. 364), as the neglect of trustees to act will not overthrow a charity. See Atty-Gen. v. Boultbee, 2 Ves. Jr. 380; Atty-Gen. v. Andrew, 3 Ves. Jr. 633; Andrew v. Merchant Tailors' Co. 7 Ves. Jr. 223.

A trust shall never be permitted to fail through the failure or disability of the trustee to execute the trust. Seda v. Huble, 75 Iowa, 431.

Whether the court of chancery of New York State, in its administration of charities under the common law, will give effect to an indefinite bequest or gift where neither the trustee nor the object of the charity is designated, seems to be still an open question. King v. Woodhull, 3 Edw. Ch. 89, citing Potter v. Chapin, 6 Paige, 639; But see Holland v. Alcock, 11 Cent. Rep. 861, 108 N. Y. 312.

In Virginia such bequests cannot be sustained when the objects are uncertain and indefinite. Kain v. Gibboney, 101 U. S. 362 (25 L. ed. 813).

The mere fact of a possible abuse in the administration of the trust, whereby injury might result to the community, is no valid objection to sustaining the charity. Chambers v. St. Louis, 29 Mo. 543.

The State may, by its visitorial power, remedy such abuse. *Re* Taylor Orphan Asylum, 36 Wis. 534; Dodge v. Williams, 46 Wis. 98; Perry, Tr. § 732.

Instances of bequests held void for too great uncertainty. See Cottman v. Grace, 3 L. R. A. 149, *note*, 112 N. Y. 299.

Indefiniteness as to object and duration. See Fire Ins. Patrol v. Boyd, 1 L. R. A. 419, *note*, 120 Pa. 624.

expressed limits of a gift, whether the duration is limited in so many words or not.

As the fund in question is a part of the residue, it goes to the heirs at law and next of kin of the testator as undevised property. *Sohier* v. *Inches*, 12 Gray, 385; *Lombard* v. *Boyden*, 5 Allen, 249; *Smith* v. *Haynes*, 111 Mass. 346; *Cummings* v. *Bramhall*, 120 Mass. 552, 558; *Skrymsher* v. *Northcote*, 1 Swanst. 566, 570; *Humble* v. *Shore*, 7 Hare, 247, 249.

Decree for plaintiffs.

Julia M. MARSTON, Admrx.

v.

George B. BIGELOW.

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

1. **A collateral promise never to sue** a note made to a stranger, who is not a party to the note nor to the suit, is not a good defense to a suit on the note brought against the maker.

2. **Such a promise, made, upon good consideration,** to the maker of the note himself, would operate to defeat such suit.

3. **A promise, made by one person to another,** for the benefit of a third person, who is a stranger to the consideration, will not support an action by the latter. One who is not a party to a contract cannot sue upon it.

4. **A son who is the maker of a note** cannot avail himself, in an action upon the note, of a promise not to sue the note made for his benefit to his father by the plaintiff's intestate, the payee of the note.

5. **The nearness of the relation may be evidence** that the promise to the father was made to him acting in behalf of, and as the agent of, the son, and therefore was a promise to the son; but, when it appears that the promise was not made to the son, and that the consideration did not move from him, the nearness of the relation cannot change the general rule of law that a man cannot sue upon a contract to which he is not a party or privy.

6. **The depositing a letter in the postoffice,** addressed to a party at his place of business, is prima facie evidence that he received it in the ordinary course of the mails; and if he has changed his place of business and has informed the postoffice authorities of it, there is a presumption, or inference of fact, that the letter has been delivered at the new address.

7. **Where a promissory note is written payable "five years from] date** at the rate of 6½ per cent per annum, payable semi-annually," and the maker has paid several installments of interest upon it, the omission of the words "with interest," in the note, is a mere clerical error, and interest may be recovered thereon.

(September 7, 1889.)

ON exceptions by defendant to report of a justice of the superior court after verdict for plaintiff. *Judgment on verdict.*

Action upon a promissory note by which defendant promised to pay to plaintiff's intestate $10,000 five years from date, at the rate of 6½ per cent per annum, payable semi-annually,—six months' notice in writing to be given if payment, at the end of said term, will be required, or, before enforcing payment, if said note is allowed to run over the term above limited. Several payments of interest were indorsed upon the note. The defense is that the father of defendant paid to the plaintiff's intestate $2,687.06, being all the interest accrued on the note, and $1,770 on account of the principal sum, upon the consideration and distinct agreement of the said intestate, who was the payee in the note and the holder thereof, that he would not thereafter sue or molest the defendant in any way by reason of the note, or attempt to enforce said claim, but that the defendant might make any further payment at any time thereafter that he might wish.

The other facts appear in the opinion.

Messrs. **C. W. Turner** and **Samuel J. Elder,** for defendant:

The agreement which defendant offered to prove would have constituted a defense to this suit and could have been pleaded as a release to avoid circuity of action.

Foster v. *Purdy*, 5 Met. 443.

Being without any limitation as to time, it would have amounted to an absolute release and discharge.

2 Chitty, Cont. 11th Am. ed. 1146, and cases cited; *Seicall* v. *Sparrow*, 16 Mass. 26.

Satisfaction made by a stranger to a party having a cause of action, and adopted by the party liable to an action, is a good bar, and the act of the stranger may be adopted by pleading it as a bar.

Chitty, Cont. 11th Am. ed. 1133; *Jones* v. *Broadhurst*, 9 C. B. 173, 193; *Belshaw* v. *Bush*, 11 C. B. 191, 206; *Simpson* v. *Eggington*, 10 Exch. 845, 847.

If a stranger does trespass to me, and one of his relations, or any other, give anything to me for the same trespass, to which I agree, the stranger shall have advantage of that to bar me; for if I be satisfied it is not reason that I be again satisfied.

Fitzherbert, Abr. title *Barre*, pl. 166.

If a stranger, in the name of the mortgagor or his heir (without his consent or privity), tender the money, and the mortgagee accepteth it, this is a good satisfaction.

Co. Litt. 206, 6; cited in *Belshaw* v. *Bush*, 11 C. B. 207.

A promise made to a father for the benefit of a son might be enforced by the latter in a suit at law.

Felton v. *Dickinson*, 10 Mass. 290.

Anyone may maintain an action on a promise made to a third person for his benefit, on a consideration furnished by that third person.

Felton v. *Dickinson*, 10 Mass. 290. See *Arnold* v. *Lyman*, 17 Mass. 400; *Cabot* v. *Haskins*, 3 Pick. 92; *Carnegie* v. *Morrison*, 2 Met. 402; *Brewer* v. *Dyer*, 7 Cush. 340.

The application of the above rule was limited to certain classes of cases, of which the second class was stated to be "cases where promises have been made to a father or uncle for the benefit of a child or nephew," to which class of cases *Felton* v. *Dickinson*, *supra*, belongs.

Mellen v. *Whipple*, 1 Gray, 322.

Felton v. *Dickinson*, *supra*, is the only case in this State where an action has been maintained by a son on a promise made to his father for his benefit. The early English authorities for such a liability having been overruled by

See also 34 L. R. A. 466.

Tweddle v. *Atkinson*, 1 Best & S. 393, the case then before the court did not require a reconsideration of the question.

Exchange Bank v. *Rice*, 107 Mass. 42.

If defendant can maintain an action for a breach of the contract not to sue, made by plaintiff's intestate, he submits that to avoid circuity of action he may plead and prove it as a bar to this suit.

Foster v. *Purdy*, 5 Met. 443.

Any person, although a stranger to the consideration, may maintain an action upon a contract made in his favor with a third person.

Hendrick v. *Lindsay*, 93 U. S. 143 (23 L. ed. 855); *Bohanan* v. *Pope*, 42 Me. 93; *Lawrence* v. *Fox*, 20 N. Y. 268; *Kountz* v. *Holthouse*, 85 Pa. 235; *Allen* v. *Thomas*, 3 Met. (Ky.) 198; *Bassett* v. *Hughes*, 43 Wis. 319; *Davis* v. *Calloway*, 30 Ind. 112; *Snell* v. *Ives*, 85 Ill. 279; *Johnson* v. *Collins*, 14 Iowa, 63; *Meyer* v. *Lowell*, 44 Mo. 328, 330.

It is to be presumed that the Legislature intended the most reasonable and beneficial construction of its Act.

Gore v. *Brazier*, 3 Mass. 523; *Re Kilby Bank*, 23 Pick. 93; *Com.* v. *Kimball*, 24 Pick. 370; *Perry* v. *Porter*, 124 Mass. 338.

Statutes are not to be construed according to technical rules unless that is the apparent meaning of the Legislature; and cases not expressly named may be comprehended, although not within the letter, if they appear to be within the intent.

Whitney v. *Whitney*, 14 Mass. 88.

If plaintiff's intestate made the agreement set up in the answer, defendant acquired an equitable right to have that agreement carried out and could enforce that right by a bill in equity brought in his own name.

Metcalf, Cont. 206; *Crocker* v. *Higgins*, 7 Conn. 342; *Ward* v. *Lewis*, 4 Pick. 523; *New England Bank* v. *Lewis*, 8 Pick. 113; *Bryant* v. *Russell*, 23 Pick. 520.

The presumption of fact that letters properly directed, stamped, and mailed are received is founded upon the probability that officers of the government will do their duty.

Huntley v. *Whittier*, 105 Mass. 391; *Briggs* v. *Herrey*, 130 Mass. 188.

Mr. **P. B. Kieran** for plaintiff.

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

The defendant offered to prove as a defense to the note sued on that on January 29, 1879, which was before the note matured, his father, Samuel Bigelow conveyed to the plaintiff's intestate a piece of land; that a part of the consideration, viz., $1,770, was paid and indorsed upon this note, and that in consideration thereof the plaintiff's intestate agreed never to molest or trouble the defendant by suit for the balance due upon the note. This is not an offer to prove a satisfaction and discharge of the note. Indeed such a defense is not open under the pleadings; and the evidence shows that a year afterwards the defendant made a payment on account of the balance due on the note, thus recognizing it as an existing obligation. It was merely an offer to prove a collateral promise never to sue the note, made to a stranger who is not a party to the note or to this suit. Such a promise made upon good consideration to the defendant himself would operate to defeat the suit. *Foster* v. *Purdy*, 5 Met. 442.

The question is whether the defendant can avail himself of such a promise made to a stranger, as a defense to the note. Unless he could bring a suit upon such contract he cannot use it as a defense.

Different rules upon this subject have been adopted and acted upon by different courts. But in this Commonwealth, as is stated in *Exchange Bank of St. Louis* v. *Rice*, 107 Mass. 37, "the general rule of law is that a person who is not a party to a simple contract, and from whom no consideration moves, cannot sue on the contract, and that, consequently, a promise made by one person to another, for the benefit of a third person who is a stranger to the consideration, will not support an action by the latter; and the recent decisions in this Commonwealth and in England have tended to uphold the rule and to narrow exceptions to it." The subject is discussed and the authorities cited in Metcalf on Contracts, 205 *et seq.*

The defendant contends that by a recognized exception to this rule, a son may sue upon a promise made for his benefit to his father. This was formerly held in several English cases, but it is not now so held in England. The only case in this court which supports the defendant's contention is *Felton* v. *Dickinson*, 10 Mass. 287.

In that case the declaration contained counts in *indebitatus assumpsit* for $200 in consideration of work and labor performed for the defendant by the plaintiff at the defendant's request, and on a *quantum meruit* for the same work and labor.

The evidence, at the trial, was, that the father of the plaintiff, when the latter was fourteen years of age, placed him in the service of the defendant, upon an agreement that the plaintiff was to remain in that service until he should be of age, that the defendant was to support him during that time, and to pay him $200 when he was of age.

Upon the peculiar facts of the case, we think the court rightly decided that the son could maintain the action. The agreement of the father operated as an emancipation of the son, and entitled him to receive the wages of his labor. *Corey* v. *Corey*, 19 Pick. 29.

The consideration of the wages he was to receive when he became of age was his labor, and it may well be held, as matter of law, that the promise to the father to pay the son a stipulated sum was made to the father acting on behalf of and as the agent of the son and thus a promise to him. The agreement was not an independent agreement in which the son had no particular interest. From the nature of the contract he was a privy and party to it. He had an interest in it and the father and the defendant could not, without his assent, rescind the agreement just before he became of age and thus defeat his rights under it. The court, in its opinion, puts the decision upon the broad ground that "when a promise is made to one for the benefit of another, he for whose benefit it is made may bring an action for the breach." But as we have seen, this is not the law, as established by the later decisions. *Exchange Bank of St. Louis* v. *Rice*, *ubi supra* and cases cited.

While the case of *Felton* v. *Dickinson* was rightly decided upon its peculiar circumstances, we think it cannot be fairly regarded as establishing a general rule that a son may sue upon a promise made for his benefit to his father. The nearness of the relation may be evidence that the promise to the father was made to him acting in behalf of and as the agent of the son, and therefore was a promise to the son; but when it appears that the promise was not made to the son, and that the consideration did not move from him, we can see no reason why the nearness of the relation should change the general rule of law that a man cannot sue upon a contract to which he is not a party or privy.

In the case at bar there was no offer to prove a promise to the defendant not to sue; the promise is set out in the pleadings and in the offer of proof as a promise to the father upon a consideration moving wholly from him. As to such agreement, there was no privity of contract between the plaintiff's intestate and the defendant. The only contract is between the defendant and Samuel Bigelow, and they may at any time revoke and annul it. The only party entitled to sue the defendant upon that contract, either at law or in equity, is Samuel Bigelow. The case falls within the general rule of law that one who is not a party to a contract cannot sue upon it. As the defendant could not enforce this agreement which he offered to prove, either in law or equity, he cannot avail himself of it as a defense in this suit, and the superior court rightly rejected the evidence offered by him to prove such contract.

There was evidence, proper to be submitted to the jury, that the defendant received the notice which was mailed to him, and the prayer for a ruling that there was no evidence of the delivery of the notice was properly refused.

The second ruling requested by the defendant was properly refused.

The depositing a letter in the postoffice, addressed to a party at his place of business, is prima facie evidence that he received it in the ordinary course of the mails. This is founded upon the presumption that the public officers will do their duty. *Huntley* v. *Whittier*, 105 Mass. 391.

So if a party has changed his place of business, and has informed the postoffice authorities of it, there is a presumption or inference that the letter has been delivered at the new address. The deposit of the letter in the postoffice, accompanied by evidence that the authorities knew of the change, furnishes competent evidence that the party has received the letter. In either case there is a disputable presumption or inference of fact, the weight of which is for the jury.

In the case at bar there was other evidence tending to show the receipt by the defendant of the letter addressed to him by the plaintiff's intestate, and the court properly left it to the jury to determine, upon all the evidence, whether the defendant had received the letter, giving such weight to the presumption or inference as they thought it entitled to.

It is plain that the omission of the words "with interest," in the note sued on was a mere clerical error and the instruction on this subject was sufficiently favorable to the defendant.

Judgment on the verdict.

TENNESSEE SUPREME COURT.

KANSAS CITY LAND CO., *Appt.*,
v.
Napoleon HILL *et al.*

(.....Tenn.....)

1. Where a will gives property to a daughter for life, with remainder in fee to her children living at her death, children not yet born, who survive her, will take equal interests in the property with other surviving children, and if future-born children only shall survive her, they will take the whole property, the devise being to the children living at her death, as a class.

2. A purchaser after deed made, in the absence of fraud, concealment, or misrepresentation, has no remedy, except upon the covenants

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NOTE.—*Purchaser of real property, no relief in equity for mere failure of title.*

A party has no remedy on the ground of a mere failure of title, if he has taken no covenants to secure the title, and there is no fraud in the case, either at law or in equity. Buckner v. Street, 15 Fed. Rep. 368; James v. Hays, 34 Ind. 274; Platt v. Gilchrist, 3 Sandf. Ch. 122; Thompson v. Hammond, 1 Edw. Ch. 500; Chesterman v. Gardner, 5 Johns. Ch. 29; Whittemore v. Farrington, 7 Hun, 394.

That the vendor is insolvent or absent from the State, or that an adverse suit is pending which involves the title, does not withdraw the case from the operation of this principle. Hill v. Butler, 6 Ohio St. 218.

If the purchaser does not wish to assume the risk of the title he protects himself by covenant; if he assumes the risk he accepts the deed without covenants. Platt v. Gilchrist, *supra*.

Where a party who, under a verbal agreement for the conveyance to him of lands, pays the consideration and is then tendered a deed without covenants, but demands a deed with covenants and is refused, and then accepts the deed without covenants, an incumbrance unknown at the time being afterwards discovered, both parties are innocent of fraud, and no legal liability rests upon the grantor. Whittemore v. Farrington, 76 N. Y. 457; Burwell v. Jackson, 9 N. Y. 535.

Relief obtainable only in case of fraud.

Where the title to real estate fails the purchaser has no remedy in equity unless there was fraud or deceit in the sale. Banks v. Walker, 3 N. Y. Legal Obs. 342, 2 Sandf. Ch. 348; Patton v. Taylor, 48 U. S. 7 How. 159 (12 L. ed. 649).

Imposition and fraud upon the purchaser, by any willful misrepresentation or concealment, takes the case out of the general rule, and entitles him to be redressed in equity, in addition to and beyond

5 L. R. A.

See also 22 L. R. A. 598.

in the deed, unless the seller is insolvent; and is not entitled to a rescission, so long as he remains in possession.

3. **If there is a failure of title to the whole of the property** conveyed, the measure of damages upon the covenant of seisin will be the price paid; and a recovery will operate practically as a rescission; for a purchaser cannot be permitted to recover back the consideration, and also retain the property conveyed.

4. **One wishing to acquire land, who procures the foreclosure** of a deed of trust thereon, and buys the land at the sale, made openly upon public advertisement and competitive bidding, with no object in view but the extinguishment of the creditor's remedies against the land, is not thereby guilty of fraud upon other persons interested in the land.

5. **Constructive notice of a will** from its being a public record extends only to persons acquiring rights or titles which are in some way resting on, or subordinate to, or affected by, the will, and not to those acquiring titles wholly independent of and superior to the will.

6. **There can be no fraudulent concealment** of a fact of which a party has only constructive, or presumptive, and not actual, knowledge.

7. **The rule that a party is held to have constructive notice** of all that appears in other deeds or instruments referred to in his title deeds as limiting or affecting his title does not apply to collateral instruments referred to, not as relating to the title, but only to the consideration of the land conveyed.

8. **Where a member of a fluctuating class** to whom land is devised, who has no fixed interest therein, conveys to a third person, the latter is not a tenant in common with the others of the class.

(May 7, 1889.)

APPEAL by complainant from a decree of the Chancery Court of Shelby County in favor of defendants in a suit to quiet title to certain land bought by complainant from the principal defendant. *Affirmed.*

The facts are stated in the opinion.

Mr. **Wm. N. Randolph,** for appellant:

If none of the children should be surviving when their mother, Mrs. Elizabeth M. Hays, dies, then no estate under the will of their grandmother, Mrs. Walker, will ever vest in them.

Satterfield v. *Mayes*, 11 Humph. 58.

The court said in *Beasley* v. *Jenkins*, 2 Head, 193, that there was nothing in any subsequent decision that militated against the rule in *Satterfield's Case*, as properly understood and applied.

All this class of cases turn on "the fact that the intention of the giver is manifested in the instrument wherein he makes the gift to leave the contingency of some event, or some series of events, to determine which of certain persons named or indicated shall ultimately be the objects of his bounty, which event or series of events may or may not happen until after the death of the donor or devisor."

Bingham, Descents, chap. 4, § 3, p. 95 *et seq.*

In this class of cases the parties contingently entitled have no such estate as they can pass by deeds of conveyance.

See *Cowan* v. *Wells*, 5 Lea, 682; *Thomas* v. *Northcross*, 11 Lea, 345; *Brewster* v. *Striker*, 2 N. Y. 19; *Re Ryder*, 11 Paige, 185; *Tuyloe* v. *Gould*, 10 Barb. 388; *Moore* v. *Littel*, 40 Barb. 488, 41 N. Y. 66; *Watson* v. *Woods*, 3 R. I. 226; *Brown* v. *Williams*, 5 R. I. 309; *Hunt* v. *Hall*, 37 Me. 363; *Snow* v. *Snow*, 49 Me. 159; *Gifford*

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the covenants in the deed. Denston v. Morris, 2 Edw. Ch. 43.

It is not enough that the vendor made representations which turn out to be untrue; he must have known them to be untrue. It is the knowledge which constitutes the fraud. Tallman v. Green, 3 Sandf. Ch. 441; Woodruff v. Bunce, 9 Paige, 445.

No relief against collection of bond and mortgage.

The purchaser, having given a bond and mortgage for balance due on land, cannot resist payment on this ground. Abbott v. Allen, 2 Johns. Ch. 519; followed in Leggett v. McCurty, 3 Edw. Ch. 126; Griffith v. Kempshall, Clarke, 578; Banks v. Walker, 2 Sandf. Ch. 348.

No relief will be granted against the collection of a bond and mortgage for purchase money where possession has passed and continued without an eviction at law under a paramount title. Platt v. Gilchrist, 3 Sandf. 122; Curtiss v. Bush, 39 Barb. 664; Abbott v. Allen, 2 Johns. Ch. 519; Banks v. Walker, 2 Sandf. Ch. 344; Pepper v. Haight, 29 Barb. 439.

A defect of title to mortgaged premises conveyed by the mortgagee is no defense in a suit for the foreclosure of a mortgage for part of the consideration. Hulfish v. O'Brien, 29 N. J. Eq. 231; Price v. Lawton, 27 N. J. Eq. 327; Davison v. De Freest, 3 Sandf. Ch. 456; Miller v. Avery, 2 Barb. Ch. 582; Withers v. Morrell, 3 Edw. Ch. 569; Tallmadge v. Wallis, 25 Wend. 107; Edwards v. Bodine, 26 Wend. 109.

While a mortgage is void as to a judgment, such judgment could not be enforced, because, provided the mortgagee would, at any time before sale upon execution, file his mortgage, or attend the sale and give notice of his mortgage, no one could purchase free from the mortgage (Best v. Staple, 61 N. Y. 79; Hildreth v. Sands, 2 Johns. Ch. 35, 14 Johns. 493; Griffith v. Griffith, 9 Paige, 315; Thompson v. Van Vechten, 27 N. Y. 580); but where the contract is entered into under a mutual misconception of legal rights amounting to a mistake of law, this rule does not apply. Champlin v. Laytin, 1 Edw. Ch. 476; Guice v. Sellers, 43 Miss. 52, 5 Am. Rep. 477; Abbott v. Allen, 2 Johns. Ch. 521; Woodruff v. Bunce, 9 Paige, 445.

Remedy by injunction, when.

When the covenants have been actually broken, and the grantor is insolvent, a court of equity may restrain him from proceeding to collect the whole amount of the purchase money, and may offset the damages occasioned by the breach of the covenants of seisin or warranty, against such unpaid purchase money. Wanzer v. Truly, 53 U. S. 17 How. 584 (15 L. ed. 216); Fehrle v. Turner, 77 Ind. 535.

If the grantor is solvent there is a full legal remedy upon the covenants and consequently no reason for resorting to the extraordinary remedy of an injunction. Wimberg v. Schwegeman, 97 Ind. 330. See Miller v. Avery, 2 Barb. Ch. 582.

No relief in equity without eviction by paramount title.

There can be no relief in equity, under the covenants, without an eviction by title paramount; a failure of consideration for the want of title affords no ground for equitable relief. Champlin v. Laytin, 1 Edw. Ch. 476, 6 Paige, 198.

There can be no relief where possession passed and continued without eviction under a paramount

v. *Thorn*, 9 N. J. Eq. 702; *Van Tilburgh* v. *Hollinshead*, 14 N. J. Eq. 32; *Olney* v. *Hull*, 21 Pick. 311; *Hayes* v. *Tabor*, 41 N. H. 521; *Robertson* v. *Wilson*, 38 N. H. 48; *Hall* v. *Nute*, 38 N. H. 422; *Brown* v. *Brown*, 44 N. H. 281; *Miller* v. *Keegan*, 14 Ind. 502; *Augustus* v. *Seabolt*, 3 Met. (Ky.) 155.

I think an examination of the adjudged cases will show beyond question that the words of the will must be confined to children of Mrs. Elizabeth M. Hays and 'that grandchildren are not included.

Booker v. *Booker*, 5 Humph. 505; *Morton* v. *Morton*, 2 Swan, 318; *Deadrick* v. *Armour*, 10 Humph. 588; *Adams* v. *Law*, 58 U. S. 17 How. 417 (15 L. ed. 149).

A remainder always has its origin in express grant. A reversion merely arises incidentally in consequence of the grant of the particular estate. It is created simply by the law, while a remainder springs from the act of the parties.

Williams, Real Prop. *223, 239. See also 2 Washb. Real Prop. chap. 8, *389; *Case of the Provost of Beverley*, Y. B. 40 Edw. III. 9.

The power of alienation is thus allowed to be exercised in some degree to its own destruction. For, till such future estates come into existence, they may have no owners to convey them. Of these future estates there are two kinds, a contingent remainder, and an executory interest. The former is allowed to be created by any mode of conveyance.

Williams, Real Prop. 243.

Messrs. **Hill & Wilkerson, Craft & Craft,** and **Metcalf & Walker** for respondents.

Pitts, *Sp. J.*, delivered the opinion of the court:

On the 25th of June, 1887, Napoleon Hill sold and conveyed by deed, with covenants of seisin, general warranty, and against incumbrances, to the Kansas City Land Company, a tract of land in Shelby County of 66.37 acres, for the consideration of $149,320.50, of which the sum of $56,000 was paid in cash, and the balance secured by two notes for $46,666.25 each, bearing interest, and due at one and two years. A lien was retained in the deed, and the Land Company was placed in possession. On the 22d June, 1888, a few days before the maturity of the first note, the Land Company filed the original bill in this cause against Hill, its vendor, Mrs. Elizabeth M. Hays (named in the bill as Lizzie W. Hays) and her three sons, Samuel J., James W., and John M. Hays, suggesting that the title to 44 of the 66.37 acres conveyed to it by Hill was doubtful, and probably defective; that, if so, Hill had fraudulently represented that his title was good to the whole of the property conveyed; and that without the forty-four acres, which were claimed by the other defendants, the purchase was not desirable; and praying in the alternative: *first*, that its title under Hill's conveyance be declared perfect and indefeasible, and the claims of the other defendants adjudged to be clouds thereon, and removed; and, *secondly*, if this could not be done, that his purchase from Hill be rescinded, its notes delivered up and canceled, and that it have a decree against Hill for the purchase money paid, with interest. The primary relief sought by this bill is the quieting and confirmation of the complainant's title, and its efforts throughout are, manifestly, to show that its title is good, notwithstanding the facts suggested as casting a doubt upon it. The bill was dismissed as to James W. and John M. Hays, upon their demurrer, on grounds which need not now be considered. Samuel J. Hays filed a separate answer, which he prayed might

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title. Whittemore v. Farrington, 7 Hun, 395; Hyslip v. French, 52 Wis. 516.

A failure of consideration for the want of title affords no ground. Chesterman v. Gardner, 5 Johns. Ch. 29; Gouverneur v. Elmendorf, Id. 79; Miller v. Avery, 2 Barb. Ch. 595; Edwards v. Bodine, 26 Wend. 114; Withers v. Morrell, 3 Edw. Ch. 560.

So long as the purchaser remains in the peaceful possession of the premises, or until he surrenders possession to a paramount title, he is estopped from contesting the validity of the title in an action to foreclose a mortgage which defendant assumed to pay on his purchase. His only remedy would be at law on the covenants in the deed. Parkinson v. Sherman, 7 N. Y. Week. Dig. 129, 74 N. Y. 88; Edwards v. Bodine, 26 Wend. 114; Leggett v. M'Carty, 3 Edw. Ch. 126; Griffith v. Kempshall, Clarke, 578; Woodruff v. Bunce, 9 Paige, 445; Thompson v. Jackson, 3 Rand. 504; Coleman v. Rowe, 5 How. (Miss.) 460; Platt v. Gilchrist, 3 Sandf. Ch. 118; Ryerson v. Willis, 81 N. Y. 280; Dunning v. Leavitt, 85 N. Y. 30; Farnham v. Hotchkiss, 2 Keyes, 15, 2 Abb. App. Dec. 99; Young v. Guy, 23 Hun, 11; Curtiss v. Bush, 39 Barb. 664; Patton v. Taylor, 48 U. S. 7 How. 159 (12 L. ed. 649); Wanzer v. Truly, 58 U. S. 17 How. 584 (15 L. ed. 216); Akerly v. Vilas, 21 Wis. 109; Freeman v. Auld, 44 N. Y. 50; Thorp v. Keokuk Coal Co. 48 N. Y. 253; Shadbolt v. Bassett, 1 Lans. 121; Miller v. Long, 3 A. K. Marsh. 335; Saunders v. Beal, 4 Bibb, 343; Barkhamsted v. Case, 5 Conn. 528; Lloyd v. Jewell, 1 Me. 352; Champion v. White, 5 Cow. 510; Greenby v. Cheevers, 9 Johns. 126; Gibson v. Newman, 1 How. (Miss.) 341; Miller v. Owens, Walker (Miss.) 244.

Where title fails the remedy is on covenants in the deed.

The purchaser has no remedy in equity to recover back the price unless there was fraud or deceit in the sale. If he has taken the precaution to require covenants as to the title before paying the price his remedy is at law. Phillips v. Hudson, 31 N. J. L. 161; Banks v. Walker, 2 Sandf. Ch. 348; 3 N. Y. Legal Obs. 342; Tobin v. Bell, 61 Ala. 129; Alden v. Pryal, 60 Cal. 222; Harding v. Commercial Loan Co. 84 Ill. 261; M'Farlane v. Griffith, 4 Wash. C. Ct. 587; James v. Hays, 34 Ind. 274; Strong v. Waddell, 56 Ala. 473; Peters v. Bowman, 8 N. Y. Week. Dig. 301; 1 Pom. Eq. Jur. 165; Edwards v. Bodine, 26 Wend. 109; Tallmadge v. Wallis, 25 Wend. 107; Cullum v. Branch Bank, 4 Ala. 21; Denston v. Morris, 2 Edw. Ch. 27; Bates v. Delavan, 5 Paige, 300; Gouverneur v. Elmendorf, 5 Johns. Ch. 79; 2 Kent, Com. 2d ed. 473; Patton v. Taylor, 48 U. S. 7 How. 159 (12 L. ed. 649); Noonan v. Lee, 67 U. S. 2 Black, 507 (17 L. ed. 280); Corning v. Smith, 6 N. Y. 84; Beebe v. Swartwout, 8 Ill. 162; Com. v. McClanahan, 4 Rand. 482; Greenleaf v. Cook, 15 U. S. 2 Wheat. 16 (4 L. ed. 173); Barkhamsted v. Case, 5 Conn. 528; Maner v. Washington, 3 Strob. Eq. 171; Bumpus v. Platner, 1 Johns. Ch. 213; Van Waggoner v. McEwen, 2 N. J. Eq. 412; Shannon v. Marselis, 1 N. J. Eq. 426; Natchez v. Minor, 9 Smedes & M. 544; Davison v. De Freest, 3 Sandf. Ch. 456; Waddell v. Beach, 9 N. J. Eq. 793; Rawle, Cov. Title, 3d ed. 676-686; Laughery v. McLean, 14 Ind. 106; Anderson v. Lincoln, 5 How. (Miss.) 279; Thompson v. Jackson, 3 Rand. 507.

be taken also as a cross-bill, claiming an interest in the forty-four acres under the will of his grandmother, Mary A. Walker. No defense seems to have been made by Mrs. Elizabeth M. Hays. Hill also answered, and denied all fraud, and that the title was doubtful or defective, and subsequently filed a cross-bill to enforce his lien for purchase money.

The complainant land company, in its answer to this cross-bill, reversing the theory maintained by it in its original bill, vigorously assaults the title of Hill, and sets out with great minuteness and detail the facts on which it strenuously insists the title is bad, and asks unconditionally to be relieved of its purchase. It traverses some of the statements of its original bill, and feeling, doubtless, the force of this inconsistency in its pleadings, states, by way of explanation in the answer, that such inconsistency arose from the insufficiency and falsity of the information upon which the contrary allegations in the bill were predicated, and that it has since ascertained the truth as set forth in the answer. This feature of the case has been adverted to by counsel for defendants, and may be disposed of at once. Upon inspection of the two pleadings, it is apparent that the repugnancy between them is more of theory than of fact, and arises either upon statements made on information, or upon statements of complainant's conclusions, and hence does not work any estoppel against the truth.

The chancellor, upon a hearing on the merits, held the title good, denied relief to the complainant Land Company and defendant Samuel J. Hays, and gave defendant Hill a decree on his cross-bill enforcing his lien for purchase money. From this decree, as well as the previous decree sustaining the demurrer of James W. and John M. Hays, the Land Company appeals, and alone assigns error.

The land in controversy originally belonged to Mrs. Mary A. Walker, and it is conceded that the title must be derived from her. This defendant Hill undertakes to do in two ways, and through two distinct and separate chains, the one beginning with a deed of trust made by Mrs. Walker in her lifetime, and the other with her will. It was upon the first of these two chains of title—that beginning with the deed of trust—that the chancellor based his decree, and, if his view of the case is correct, it is conclusive, however defective the other chain may be. This aspect of the case will therefore be considered first.

The deed of trust was executed on the 11th day of July, 1872, by Mary A. Walker, defendant, Elizabeth M. Hays (therein named as Lizzie W. Hays), and her husband, A. J. Hays, to C. B. Wellford, as trustee to secure eleven promissory notes of the same date, made by the makers of the deed, and payable to the life association of America,—one for $5,000, due five years after date, and ten for $250 each, for interest, due, respectively, at the end of each semi-annual period from date; all of the notes being given to secure a loan of $5,000, with 10 per cent interest, payable semi-annually. It provided that, upon default in the payment of any of the notes at maturity, the right of immediate foreclosure should accrue, and the whole debt, for the purpose of foreclosure, become due at once. A similar result was to follow, by the terms of the deed, upon a failure to pay taxes promptly as they accrued. It was properly acknowledged and registered, and no question is made against its validity. It is shown that the debt secured by it was the debt of Mrs. Walker, incurred for improvements on the property now in controversy when it belonged to her. No reason is shown for the joining of Mrs. Hays and her husband in this deed, unless it be the fact that Mrs. Walker had previously made her will devising the property to Mrs. Hays for life, though this does not appear from the face of the deed.

On the 28th of July, 1877, after the death of Mrs. Walker, Wellford, the trustee, sold the property, in pursuance of the terms of the deed, to Napoleon Hill and W. F. Taylor for $6,005, which they paid in cash, being about $100 in excess of the debt then due and expenses of sale; and on the 30th of the same month the trustee conveyed to them by deed, with proper recitals. Taylor subsequently sold and conveyed his interest to Hill. These conveyances are all regular, and exhibit a good and indefeasible title on their face. This is not controverted.

But it is insisted on behalf of the opponents of Hill that the sale and conveyance by Wellford, the trustee, were procured by the fraud and collusion of Hill and Taylor and one Charles Hewitt, with a view to cutting off the devisees of Mrs. Mary A. Walker, and that such conveyance is therefore ineffectual as against such devisees, and is liable to be impeached by them and declared void at any time. This contention is specially important on account not only of the magnitude of the interests involved, but also of the provisions of the will of Mary A. Walker, by which the property in controversy was given to her daughter Elizabeth M. Hays for life, with remainder in fee to her children living at her death. Children of Mrs. Hays not yet born, should such survive her, will take an interest in the property under the will, in conjunction with such of her present children as shall also survive her, and, in the event that future-born children only shall survive her, they will take the whole property, the devise being to the children of Mrs. Hays, the survivors or survivor of them, at her death, as a class. *Satterfield* v. *Mayes*, 11 Humph. 57; *McClung* v. *McMillan*, 1 Heisk. 655–660; *Bridgewater* v. *Gordon*, 2 Sneed, 5.

It is possible, therefore, that the persons who will ultimately take the remainder under this will, and who are to be affected by the alleged fraud against the remaindermen, are not now in existence. If, then, the title is subject to the alleged infirmity, it is of the greatest importance to complainant that the fact be ascertained at once, and timely relief afforded, as otherwise, upon the future total or partial failure of the title by reason of such infirmity in the possible contingency stated, its remedy upon the covenants of the deed under which it holds might be wholly inadequate. The present children of Mrs. Hays, with herself, have all conveyed the property in controversy to Hill, since the commencement of this suit, warranting against all persons claiming under or through them; or, to speak more accurately, they have executed and acknowledged such a conveyance, and offer to

deliver it upon the payment to them by Hill of a sum named, and he on his part agrees to comply and accept the deed on condition that the complainant Land Company now has under its deed from him a good title, or will have by virtue of the proffered conveyance by the Hayses, and a proper transfer thereof by him to complainant. So that, so far as the present children of Mrs. Hays, or Mrs. Hays herself, in any possible event, are concerned, the decision of the question stated is not necessary in the present aspect of the case, inasmuch as their proffered deed would as fully devest them of all title as could be done by the decree of the court. But in the possible contingency that a child or children of Mrs. Hays may be born hereafter, and survive her, the interest which such child or children will take under the will must necessarily defeat the title of complainant to that extent. If it be true that the deed of Wellford, the trustee, can be successfully impeached, and in view of this contingency, it is necessary to examine the question. The alleged fraud and collusion in procuring the trust sale and conveyance, it is obvious, were not wrongs against the complainant Land Company, nor anyone under whom it claims. But it is insisted that Hill, having participated in such fraud, and with knowledge of the existence and terms of the will, concealed these facts from complainant in his sale to it, and falsely represented that his title was good. The complainant having accepted a deed from Hill, and taken possession under it, and being still in possession, the bill would probably have been demurrable as a bill to rescind without these allegations of fraud, as there is no allegation of Hill's insolvency; for the general rule undoubtedly is that a purchaser after deed made, in the absence of fraud, concealment, or misrepresentation, has no remedy, except upon the covenants in the deed, unless the seller is insolvent. 1 Sugd. Vend. 8th Am. ed. 251; *Abbott* v. *Allen*, 2 Johns. Ch. 519; *Topp* v. *White*, 12 Heisk. 175; *Senter* v. *Hill*, 5 Sneed, 505; *Young* v. *Butler*, 1 Head, 640.

The question of fraud out of the way, the complainant is not entitled to a rescission so long as it remains in the undisturbed possession of the property conveyed. If the title is bad, either totally or partially, the covenant of seisin was broken as soon as made, and a right of action accrued upon that covenant immediately. If there was a failure of title to the whole of the property conveyed, the measure of damages upon the covenant of seisin would be the price paid, and a recovery would operate practically as a rescission; for a purchaser cannot be permitted to recover back the consideration, and also retain the property conveyed. Upon the pleading here, however, the case is for rescission, if for any relief at all, and the vital question, therefore, is, Have the charges of fraud been sustained?

From what has been said, it is obvious that the alleged fraud on the part of Hill relates to two distinct subjects, namely: *First*, the sale and conveyance by the trustee Wellford, which it is insisted Hill procured to be made with the view and for the purpose of cutting off the devisees of Mrs. Walker, and which necessarily implies that he had actual knowledge of the existence and terms of Mrs. Walker's will; and, *secondly*, the sale made by Hill to the complainant Land Company, in which it is insisted he concealed his knowledge of the existence and contents of the will, his agency in procuring the sale made by Wellford, and fraudulently represented that his title was good and indefeasible. The contention of Hill, on the contrary, is that he had no knowledge or information of the existence or contents of the will until long after his sale to complainant; that he had no agency whatever in procuring the sale to Wellford; and that he made no false statements or representations in his sale to complainant, and he so testifies, positively and unequivocally, in his deposition.

It appears that on the 6th day of March, 1877, after the death of the testatrix, Mary A. Walker, Mrs. Elizabeth M. Hays (who was her only surviving child and heir at law) and her husband, A. J. Hays, and son, Samuel J. Hays, conveyed the forty-four acres in controversy to one Charles Hewitt, of St. Louis, Mo., with covenants of seisin, general warranty, and against all incumbrances except the deed of trust to Wellford, which was recited as an existing incumbrance on the land, together with some past-due taxes, which incumbrance it was also recited Hewitt was to discharge as a part of the consideration. At that time the interest note, due January 11, 1877, was past due and unpaid, and one other interest note and the note for the principal had not matured. Hewitt, not having the means with which to pay the past-due note, procured Sterling & Webster, a business firm at St. Louis, to take it up from the Life Association of America, whose principal office was also at St. Louis, which they did on April 11, 1877, agreeing to hold the note a reasonable time for Hewitt's accommodation, with the deed of trust as security. It is argued by counsel for complainant that this transaction was a payment and discharge of the note as a debt against the land, under the deed of trust, and that it thereafter became only a personal debt of Hewitt to Sterling & Webster, and hence, there not being sufficient time for advertising between the maturing of the next note, July 11, and the date of the sale, that the sale was premature and void. The proof is clearly to the contrary. The transaction amounted to a purchase of the debt by Sterling & Webster, under an express agreement that they should have the benefit of the deed of trust for its security. They took up and held the note itself, and took no note from nor made any charge against Hewitt. It was a subsisting part of the trust debt at the date of the sale, past due since January previous. This note not being paid by Hewitt, Wellford, the trustee, at the instance of Sterling & Webster, who paid the costs of advertising, amounting to $22, advertised and sold the property as before stated, and out of the proceeds discharged all the notes and expenses of sale. In the mean time, the precise date not appearing, Hewitt entered upon negotiations with W. F. Taylor and defendant Hill for the sale of the property to them, Taylor conducting the negotiations on the part of himself and Hill. The terms of sale were agreed on, and a deed was prepared on July 2, 1877. But before closing the purchase Hill and Taylor procured an abstract of the title, and submitted it to counsel for examina-

tion. The title was rejected on account of the existence, unsatisfied, of the deed of trust to Wellford, and thereupon the negotiations for the sale were suspended, or abandoned.

There is no fact or circumstance shown which indicates that either Hill or Taylor at that time, or at the date of the trustee's sale, on the 28th of July, knew that Mrs. Walker had left a will. On the contrary, it appears that they knew, or had been informed, that Mrs. Hays was the only child and heir at law of Mrs. Walker, and they supposed that the title had descended to her as heir subject to the deed of trust, and it was upon this assumption that the investigation of the title proceeded. Taylor likewise testifies positively that he had no knowledge or information of a will having been made, and that he had no agency in procuring the sale made by the trustee, and no knowledge of it until he saw it advertised in the papers. A deed, however, is produced from Hewitt to Hill and Taylor, dated July 2, 1877, for this same property, containing covenants of seisin, warranty, and against incumbrances, and reciting a consideration of $8 paid; and it is shown by proof that they paid to Hewitt or his agent, after the trustee's sale, the sum of $1,000 on account of the land; and it is argued that these facts show that the sale by the trustee on July 28 was made in pursuance of a previous collusive and fraudulent understanding and agreement between Hewitt and Hill and Taylor, notwithstanding the testimony above cited to the contrary.

Although the deed bears date July 2, which was before the sale, it is clearly shown that it was not delivered nor acknowledged until the 1st day of August thereafter, and the $1,000 paid Hewitt or his agent was paid on the delivery of this deed. It was doubtless the same deed that was drawn and dated at the time the parties first agreed on the terms of sale, before the title was investigated, and was afterwards delivered without changing its date. It obviously did not take effect until it was delivered, which was after the sale and conveyance by the trustee. But, even with this explanation, it is impossible to reconcile these facts with the non-agency and indifference of Hill and Taylor as to the trustee's sale, and with their contention that their contemplated purchase from Hewitt had been abandoned, or to avoid the conclusion that the sale was made in pursuance of a previous understanding between them and Hewitt, as a thing to be done before their contemplated trade should be consummated. Why should they pay to Hewitt $1,000 after they had purchased and taken deed from the trustee, investing them with the full title, freed from the incumbrance, if they did not consider themselves under some legal or moral obligation to do so? What interest had Hewitt, then, which could pass by his deed?

The trust deed provided that the sale should be free from the right of redemption, and the sale had been so made. Hewitt, occupying the shoes of the makers of the trust, therefore did not have the right of redemption, nor does it otherwise appear that he had any interest whatever after the sale, except in the surplus of the proceeds, and his deed was evidently not intended to pass that.

Another circumstance which confirms the conclusion that Hill and Taylor must have had an agreement and understanding with Hewett before the sale that the sale should be made, and that they would eventually purchase the forty-four acres, is the fact that while Hill in his deposition says that he and Taylor would not have purchased the other land embraced in his sale to complainant, and not now in controversy, without the forty-four acres, and claims that they did not make such purchase until after their purchase of the forty-four acres at the trustee's sale, yet their deed for the other land is dated July 5, 1877, before the trustee's sale, and it is not shown that this was not the correct date of the purchase. Hill does not give any reason for taking Hewitt's deed, and paying the $1,000, the transaction having been conducted by Taylor. Taylor, in his deposition, when asked why Hewitt was paid this money, says: "I expect, to carry out the original trade." Hewitt, in answer to the question why his deed to Hill and Taylor was not delivered until the 1st day of August, says: "Mr. Hill, to the best of my recollection, refused to take a deed until after the sale of the land in dispute under Mrs. Mary A. Walker's trust deed. On the 1st day of August, when the deed was delivered, I got a check through W. I. Berlin for a thousand dollars from Hill and Taylor, paid through Hill, Fontain & Co., of Memphis, Tenn., the amount due as purchase money."

The true state of facts on this question, established by the proof and circumstances, must be taken to be that, upon discovering the unsatisfied trust deed, Hill and Taylor refused to complete their purchase from Hewitt until the trust deed should be foreclosed, and the same was thereupon suspended, but with the understanding that, if Hill and Taylor should become the purchasers of the property at the foreclosure sale, they would then complete their purchase from Hewitt, accept his deed, and pay him the margin of difference, if any, between the contract price agreed on with him and the amount bid at the sale. It does not definitely appear what the original contract price to be paid Hewitt was. It is stated in general terms by Taylor to have been $8,000 or $10,000, he does not remember definitely, and there is no other direct evidence of the amount. There were several years' back taxes due upon the property, which Hill and Taylor assumed to pay in their purchase from the trustee, and it is fairly inferable that these taxes, and the $1,000 paid Hewitt, made up the margin of difference between the contract price and the amount paid the trustee.

Now, upon this state of facts, what is the effect of the transaction on the title of the devisees of Mrs. Walker? Does it constitute such a fraud upon their rights as, if they were here now complaining, would entitle them to relief against the purchasers at the trust sale? Undoubtedly, if the sale was brought about by Hill and Taylor for the purpose of defrauding the devisees of Mrs. Walker out of their estate in remainder, it could not be allowed to prevail against them, and probably the same result would follow if its purpose were otherwise fraudulent or unlawful. But the real question is, Was it fraudulent or unlawful as against anyone? The purchasers having no knowledge of the will of Mrs. Walker, it is not possible

that they could have purposed any prejudice of her devisees. Mrs. Hays was known by them to be the only heir upon whom they believed the property had descended, and they knew she had conveyed her entire interest in this land to Hewitt. It is equally impossible, therefore, that their purpose could have been to injure her. It is perfectly obvious, on the other hand, that the persons against whom they were seeking protection by foreclosure were neither the heirs nor the devisees of Mrs. Walker, but the holders of the notes, the incumbrances of the land. They knew, it is true, that Hewitt had assumed the payment of this incumbrance, but they could not ascertain from the trust deed how much remained unpaid, nor had they any certain and convenient means of doing so in any way. The notes were payable to a corporation of another State. It was possible that some of the notes that were claimed to have been paid had not in fact been paid. It was also possible that the land might be made liable to the general creditors of Mrs. Walker for their debts. Hill and Taylor, therefore, had good reason for being unwilling to take upon themselves so uncertain and elastic an obligation as Hewitt had assumed, and the proof is they did positively refuse to do so. Being desirous of acquiring the land, and unwilling to assume the incumbrance on it, or to buy subject to it, and take the risk of other liabilities that might come against it, was there anything unlawful or improper in Hill and Taylor becoming active or instrumental in moving the creditor or the trustee to proceed to foreclosure in accordance with the terms of the trust, and in buying the land at the sale, made openly upon public advertisement and competitive bidding, and with no object in view but the extinguishment of the creditor's remedies against the land? We hold most unquestionably not. No fraud can be predicated of such a transaction. It was perfectly innocent and lawful, and just such a course as would have suggested itself to any prudent business man under similar circumstances.

But it is further insisted for the Land Company that Hill and Taylor were affected with notice of the existence and terms of Mrs. Walker's will, because: *first*, the will had been probated and placed upon the public records of the county, and the law, therefore, presumed their knowledge of it; and, *secondly*, in Hewitt's deed from Mrs. Hays and her husband and son it is recited that Hewitt, as a part of the consideration thereof, had conveyed to them a tract of land in Mississippi County, Ark., and in this latter conveyance it is cited that Mrs. Walker had made a will, giving the property in controversy to Mrs. Hays and her children; and it is insisted that, Hill and Taylor having accepted a deed from Hewitt, they are fixed with notice of the contents of all deeds and instruments recited or referred to in his title papers.

Both propositions are untenable upon the facts of this case. Hill and Taylor claiming, as they do, under a deed of trust made by the testatrix in her lifetime, and therefore independent of and superior to any title resting on her will, the probate and record of the will are not even constructive notice to them. Constructive notice of the will, arising from the fact that it is a public record, extends only to persons acquiring rights or titles which are in some way resting on, or subordinate to, or affected by the will, and does not extend to those acquiring titles wholly independent of and superior to the will; and, again, if the public record of the will were constructive notice of its existence, and terms to Hill and Taylor, still it would not be sufficient, for the charge is that they fraudulently concealed their knowledge of it, which implies actual, and not constructive, knowledge.

There can be no fraudulent concealment of a fact of which a party has only constructive or presumptive knowledge, where the absence of actual knowledge is positively proven, as in this case.

The second proposition is answerable in the same way. It is, at most, constructive notice only. And, again, while the general rule is that a party is held to have constructive notice not only of all that appears in the deeds constituting his chain of title, but also of all that appears in all other deeds and instruments recited or referred to in them as being connected with, or as limiting or affecting the title or property conveyed, yet there are exceptions to the rule, and it does not, in principle, apply to collateral and immaterial conveyances or instruments incidentally referred to, not as relating in any way to the title or property conveyed, but only to the consideration. Bigelow, Estop. p. 341 *et seq.*; 2 Devlin, Deeds, §§ 1000, 1006.

There is nothing in the deed of the Hayses to Hewitt, for the land in controversy, to indicate that the deed therein referred to as having been made by him to them for the Arkansas plantation has any bearing whatever upon the title conveyed to him. It is merely mentioned as a part of the consideration.

It is further insisted for complainant that the effect of the foreclosure sale, and purchase by Hill and Taylor, under the facts and circumstances, and especially in view of the previous understanding with Hewitt, and their subsequent acceptance of a deed from him, was the same as if Hewitt had himself paid off the incumbrance, or had himself purchased at the sale, and then conveyed to them, and that the title acquired by Hill and Taylor must be restricted to that which Hewitt acquired by his deed from the Hayses. This contention is based upon the assumption that the conveyance from the Hayses to Hewitt was only of the life estate of Mrs. Hays, and the supposed interest or expectancy of Samuel J. Hays, under the will of Mrs. Walker; and it is argued that the effect of the conveyance was to make Hewitt tenant for life of the whole land, and tenant in common with James W. and John M. Hays of the remainder. The position is untenable, for several reasons. The deed does not purport to convey a life estate or interest in common, or anything less than the whole fee. The vendors covenant that they are seised of the whole estate in the land, and warrant the title against all persons. They also covenant against all incumbrances, except those specified.

There is no proof that as a matter of fact the deed was intended to operate to pass less than the whole fee. Under these circumstances,

Hewitt's assumption of the incumbrance on the land ought not, at most, to be extended beyond the indemnity of his vendors. Finding that he had obtained under the deed less than he had bargained for, and less than it purported to convey to him, it is at least questionable whether he might not have purchased at the foreclosure sale himself for his own benefit, and thereby perfected his title as against those interested who had not joined in the deed to him. There was no privity of contract between him and them. If there was any privity of estate, it was technical and *in invitum*. Certainly he did not owe it to them to pay the incumbrance for the protection of their interest. But, at all events the obligations of life tenant to remainderman, and of one tenant in common to another, do not arise on the face of this deed.

Again, the conveyance of the Hayses could not have operated as argued, so far, at least, as to create the relationship of tenancy in common, for the reason that Samuel J. Hays was not seised as tenant in common, but only as a member of a fluctuating class, with no particular or fixed interest. Again, neither the deed of the Hayses to Hewitt, nor Hewitt's deed to Hill and Taylor, as has been seen, are necessary to the latters' title. They do not have to rely on them at all. Their title, under the trust sale and conveyance, was perfected before Hewitt's deed was made to them, and by no principle can the latter deed operate *ex post facto*, to cut down their previously acquired good title to the limits of the imperfect title held by Hewitt.

And, lastly, upon the whole facts and circumstances, it is clear that the purchase of Hill and Taylor at the trust sale was made for themselves, and not under or for the benefit of Hewitt. They were under no legal obligation to buy the land, either at the sale or from Hewitt. They had the right to buy for themselves as fully as did others who attended the sale and bid. The sale was in all respects open and fair. Having bid the highest price offered, paid it, and taken the trustee's deed, the fact that they chose to pay Hewitt an additional sum, and accept a deed from him, in pursuance of a previous verbal agreement with him to do so in case they became the purchasers at a figure that would justify them in so doing, cannot be held to vitiate their purchase, and destroy their deed from the trustee as a muniment of title, proceeding from the maker of the deed of trust. There being, then, no defect in Hill's title at the time of his sale to the complainant Land Company, it follows that, even if the latter had made its purchase on the faith of his representation that his title was good, it would not show fraud, for the double reason that such representation would have been true, and have produced no injury. But it very clearly appears that complainant did not act upon any representation of Hill in respect to the title, but investigated the same for itself upon an abstract furnished by a regular abstract company of the City of Memphis, which purported to exhibit the entire record of the title, beginning with the conveyance to Mrs. Walker in 1844. This abstract was submitted by complainant to learned counsel of its own selection, for his examination and opinion. He gave a carefully prepared and elaborate opinion in writing, approving the title as good and perfect, and on the faith of that complainant made the purchase.

In this opinion, after a reference to the deed made to Hill and Taylor by the trustee, the learned counsel adds: "But outside of the title derived from the sale under said trust deed, on March 6, 1877, Elizabeth M. Hays, whom I understand to be the only child and heir at law of Mary Ann Walker, who died in 1873, together with her husband, A. J. Hays, sold and conveyed the forty-four acres to Charles Hewitt, subject to the foregoing trust deed. . . . This deed conveyed a good title to the forty-four acres to Charles Hewitt, subject to the incumbrance of the deed of trust to Wellford, and subject to whatever debts Mary Ann Walker may have owed at her death, she dying intestate."

The abstract of title contained no reference to the will of Mrs. Walker, and it is very clear that Hill had no knowledge of such a will until after his sale and conveyance to complainant, so that, even if the will were material to the title, Hill was guilty of no misrepresentation in regard to it. The result is, we hold that the chancellor's view of the case is correct, and it is therefore unnecessary to consider the other question suggested at the outset.

Affirm the decree, with costs.

UNITED STATES DISTRICT COURT, DISTRICT OF OREGON.

The CITY OF CARLISLE, William BASQUALL, *Libelant.*

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

1. **The United States courts, as courts of admiralty, have jurisdiction** of all cases of admiralty cognizance when the thing or parties are within the reach of their process, without reference to the nationality of either.

2. **It is the right of** a seaman injured in the service of a vessel to be cared for, at least to the end of the voyage, and nothing short of gross negligence or willful misconduct, causing or concurring to cause the injury, will forfeit such right.

3. **A seaman injured in the service of a vessel** has a lien on the same for the damages he may sustain by reason of the neglect or misconduct of the officers thereof, in caring for him while affected by such injury.

4. **The admissibility or competency of evidence** in a legal proceeding pertains to the remedy, and is governed by the *lex fori*, and therefore a clause in the British Shipping Act of 1854, making certain entries in the official logbook competent evidence in all courts, does not make them so in the courts of any other country.

5. **The joinder of causes** of suit not enumerated in admiralty Rules 12 to 20 inclusive are not governed thereby, but by Rule 46; and where the facts in a case establish a liability against the

master and a lien on the ship for the same claim, such liability and lien may be enforced in one libel.

6. **On the facts found,**—*Held*, that the master and vessel are liable to the libelant for damages for not caring for him after his injury as he was entitled to be, and for the aggravation of his injury and suffering caused thereby.

(August 20, 1889.)

LIBEL in admiralty, against the British bark City of Carlisle, and her master, to recover damages for personal injuries sustained by libelant, from neglect and maltreatment while employed on board said bark as a seaman. *Decree for libelant.*

The facts are stated in the opinion.

Mr. **Edward N. Deady** for libelant.

Messrs. **Williams & Wood,** and **J. Ditchburn,** for respondent:

The log-book is admissible in evidence under both the English and the American law. This case being a suit by a British subject against a British ship and her British master to recover damages for a breach of a contract entered into on British soil, the English law is to be applied as to this point.

Liverpool & G. W. Steam Co. v. *Phenix Ins. Co.* 129 U. S. 397 (32 L. ed. 788); *The Brantford City*, 29 Fed. Rep. 373, 384.

The law of the ship's home is applied, by comity, to regulate the mutual relations of the ship, her owner, master and crew, as among themselves, their liens for wages, and modes of discipline.

The Johann Friederich, 1 W. Rob. 35; *The Enterprise*, 1 Low. 455; *Covert* v. *The Wexford*, 3 Fed. Rep. 577; *The J. L. Pendergast*, 29 Fed. Rep. 127. See also *The Belgenland*, 114 U. S. 365 [29 L. ed. 155]; *The Olga*, 32 Fed. Rep. 329; *Harvey* v. *Smith*, 35 Fed. Rep. 367; *Wilson* v. *The John Ritson*, Id. 663; *The Egyptian Monarch*, 36 Fed. Rep. 773, 774.

A ship's log-book, when it is required by law to be kept, is an official register, so far as regards the transactions required by law to be entered in it, but no further.

1 Greenl. Ev. § 495; 1 Whart. Ev. § 648.

Offers of compromise and settlement seem to have come from both sides.

Wood, p. 66; Moore, pp. 139–141.

The testimony of the expert Dr. Strong furnishes no ground for damages, and should be stricken out, so far as it relates to future ill health. It cannot be considered by the court.

Strohm v. *New York, L. E. & W. R. Co.* 96 N. Y. 305, 306.

To entitle a plaintiff to recover present damages for apprehended future consequences, there must be such a degree of probability of their occurring as amounts to a reasonable certainty that they will result from the original injury.

Curtis v. *Rochester & S. R. Co.* 18 N. Y. 541; *Filer* v. *New York Cent. R. Co.* 49 N. Y. 45; *Clark* v. *Brown*, 18 Wend. 229; *Lincoln* v. *Saratoga & S. R. Co.* 23 Wend. 425, 435; *Tozer* v. *N. Y. Cent. & H. R. R. Co.* 6 Cent. Rep. 814, 105 N. Y. 617.

"Gross System of Surgery," was not introduced at the trial, nor is it admissible in evidence.

Collier v. *Simpson*, 5 Car. & P. 73; *Reg.* v. *Thomas*, 13 Cox, Cr. Cas. 77; *Carter* v. *State*, 2 Ind. 619; *Ware* v. *Ware*, 8 Me. 42; *Davis* v. *State*, 38 Md. 15, 36; *Com.* v. *Sturtivant*, 117 Mass. 122; *Com.* v. *Brown*, 121 Mass. 69, 75; *Harris* v. *Panama R. Co.* 3 Bosw. 7, 18; *Pinney* v. *Cahill*, 48 Mich. 584; *Stilling* v. *Thorp*, 54 Wis. 528.

The effect of contributory negligence in admiralty in actions to recover damages for personal injuries is not to bar the suit, as at common law, but simply to divide the damages "according to the equity and justice of the case," as in collision.

Olson v. *Flavel*, 34 Fed. Rep. 477.

In the absence of an Act of Congress to that effect, the admiralty courts of the United States cannot take cognizance of a libel for damages for death caused by negligence on the high seas, and this, although the vessel libeled is a foreign one.

The Alaska, 130 U. S. 201 (32 L. ed. 923); *The Harrisburg*, 119 U. S. 199 (30 L. ed. 358).

The rule of admiralty for apportioning damages in collision is to be extended to ordinary actions for personal injuries sustained on board vessels by reason of the concurring negligence of the party injured, and those for whose conduct the ship is responsible.

The Max Morris, 28 Fed. Rep. 881; *The Explorer*, 20 Fed. Rep. 135; *The Wanderer*, Id. 140. See also *The Mabel Comeaux*, 24 Fed. Rep. 490; *The Daylesford*, 30 Fed. Rep. 633.

These cases have simply gone a little further than the cases cited in *The Chandos*, 6 Sawy. 549, 550, and others of a similar character. These cases, or at least the leading ones, are—*Harden* v. *Gordon*, 2 Mason, 541; *The Atlantic*, Abb. Adm. 451; *The Ben Flint*, 1 Abb. (U. S.) 126; *Brown* v. *The D. S. Cage*, 1 Woods, 401; *The City of Alexandria*, 17 Fed. Rep. 390; *The W. L. White*, 25 Fed. Rep. 503; *The Lizzie Frank*, 31 Fed. Rep. 477.

In a few of the cases the benefit of this rule, "cure and keep," is extended beyond the time of the service of the seaman,—notably in *Reed* v. *Canfield*, 1 Sumn. 195; *Brown* v. *Overton*, 1 Sprague, 462; *Croucher* v. *Oakman*, 3 Allen, 185; and *Moseley* v. *Scott*, 14 Am. Law Reg. (5 Am. L. Reg. N. S.) 590.

Nowhere in the earlier decisions is his right to consequential damages insisted upon; indeed it is expressly denied in *Reed* v. *Canfield*, 1 Sumn. 195 and *The City of Alexandria*, 17 Fed. Rep. 390.

In none of the sea laws, or in the recognized authorities on marine law, is there any indication of liability of the ship or her owners for such hurts or injuries beyond the expenses of the care, attendance, and cure of the seaman; this is the law of this case. *The City of Alexandria* is the touchstone for *The City of Carlisle.* Read in the light of *The City of Alexandria, supra, The Noddleburn*, 28 Fed. Rep. 855; *The Neptuno*, 30 Fed. Rep. 925,—*The Lizzie Frank*, 31 Fed. Rep. 477, and other cases of a similar character, become clear and satisfactory.

Evidence of opinion ought to be received and considered with narrow scrutiny, and with much caution.

McFadden v. *Murdoch*, 1 Irish Rep. (C. L.) 211, 218; *Clark* v. *Fisher*, 1 Paige, 171.

Additional light upon the slight value of this testimony, if any, is needed.

Taylor, Ev. § 58; Best, Ev. § 514; 1 Redfield, Wills, 103; *Waters* v. *Thorn*, 22 Beav. 547, 556; *Winans* v. *N. Y. & E. R. Co.* 62 U. S. 21 How. 88, 101 (16 L. ed. 68, 71). *People* v. *Morrigan*, 29 Mich. 4, 8; *State* v. *Watson*, 65 Me. 74; *Heald* v. *Thing*, 45 Me. 392, 398.

The officers of a ship may use their discretion in navigating their vessel, but if an accident occurs, then they should have manœuvered in some other way. The law is conclusively settled that one is not required to take the very best way.

Fort Wayne, J. & S. R. Co. v. *Gildersleeve*, 33 Mich. 136; *Armour* v. *Hahn*, 111 U. S. 313 (28 L. ed. 440); *Wright* v. *N. Y. Cent. R. Co.* 25 N. Y. 566; *Wonder* v. *Baltimore & O. R. Co.* 32 Md. 416; Wharton, Neg. §§ 212, 213.

The first mate is a fellow-servant of a member of the crew (*Halverson* v. *Nisen*, 3 Sawy. 562, 564, 565); and this is especially so where the captain is on board.

The Egyptian Monarch, 36 Fed. Rep. 773, 776, 777; *Benson* v. *Goodwin*, 6 New Eng. Rep. 592, 147 Mass. 237.

A fellow-servant, within the meaning of this rule, is generally held to be one serving the same master and under his control, whether equal, superior, or inferior to the injured person in his grade or standing. The fact that the injured servant was under the control of the servant by whose negligence the injury was caused makes no difference.

See *Loughlin* v. *State*, 7 Cent. Rep. 70, 105 N. Y. 159; *Fagundes* v. *Central Pac. R. Co.* (Cal.) 3 L. R. A. 824; *Caniff* v. *Blanchard Nav. Co.* (Mich.) 10 West. Rep. 529, and the *notes* to *Reddon* v. *Union Pac. R. Co.* (Utah) 15 Pac. Rep. 267, 268; *Wolcott* v. *Studebaker*, 34 Fed. Rep. 8, 13, 14.

U. S. Rev. Stat. § 4612, especially excepts apprentices from the mere definition there given of "seaman." But this Act is not pertinent to the present question, nor does it apply to British vessels.

The Metapedia, 14 Fed. Rep. 427.

Apart from this Act, Basquall would certainly be one of the crew.

Ben. Adm. 2d ed. §§ 241, 278; 1 Conk. Adm. 2d ed. 108; Cohen, Adm. p. 241.

Should his ship render salvage services, his share of the award would go to himself in the same manner and as fully as that of the oldest seaman on board would go to him.

The Columbine, 2 W. Rob. 186; *The Two Friends*, Id. 349; *Mason* v. *The Blaireau*, 6 U. S. 2 Cranch, 240 (2 L. ed. 266).

The work upon which the crew was engaged at the time of the accident was essentially part and parcel of their common employment.

The City of Alexandria, 17 Fed. Rep. 390, 392.

Each one, therefore, upon the principles of the common-law courts, takes the risk of any negligence in the performance of his duty by any of his associates in the common employment. This must be taken to be settled law.

Hough v. *Texas & P. R. Co.* 100 U. S. 213 (25 L. ed. 612); *Brodeur* v. *Valley Falls Co.* (R. I.) 17 Atl. Rep. 54; *Daub* v. *Northern Pac. R. Co.* 18 Fed. Rep. 625, 632.

The fact that the servant injured is not twenty-one years of age, or is even a child of tender years, does not alter the rule.

Brown v. *Maxwell*, 6 Hill, 592; *King* v. *Boston & W. R. Co.* 9 Cush. 112; *Gartland* v. *Toledo, W. & W. R. Co.* 67 Ill. 498.

It is equally clear that this rule is in force in Oregon.

Willis v. *Oregon R. & Nav. Co.* 11 Or. 257.

The place where the contract of apprenticeship was entered into prevails until the contrary is shown.

Abell v. *Douglass*, 4 Denio, 305, 309; *Norris* v. *Harris*, 15 Cal. 226, 252–255; *Cressey* v. *Tatom*, 9 Or. 541, 544, 545.

No more in the admiralty than elsewhere, should the owner, without fault himself, be held as a general warrantor of the competency of any of his servants to the others, all alike engaged in the common employment of navigating the ship.

The E. B. Ward, Jr., 20 Fed. Rep. 702, 704. See also *The Lizzie Frank*, 31 Fed. Rep. 477, 480; *Peterson* v. *The Chandos*, 4 Fed. Rep. 645, 649, 650; *The Harold*, 21 Fed. Rep. 428; *The Carolina*, 30 Fed. Rep. 199, 200; *The Furnessia*, Id. 879; *The Egyptian Monarch*, 36 Fed. Rep. 773; *Halverson* v. *Nisen*, 3 Sawy. 562, 564; *Walker* v. *Maitland*, 5 Barn. & Ald. 171, 176.

The mutual relations of the ship, her owner, master and crew, as among themselves; and as pointed out above, must be determined by the law of the flag. Under that law there is no warranty like the one claimed.

Couch v. *Steel*, 3 El. & Bl. 402; *Priestley* v. *Fowler*, 3 Mees. & W. 1; 1 Kay, Ship's-Masters & Seamen, 78; Abbott, Shipping, pt. 4, chap. 5; 39 and 40 Vict. chap. 80, § 5.

A deviation may be defined to be any unnecessary or unexcused departure from the usual course or general mode of proceeding towards the original terminus *ad quem* of the insured voyage, so that the risk is altered, though it be not aggravated by such departure.

Arnould, Marine Ins. 5th ed. p. 446; 3 Kent, Com. 312, 313; Dixon, Shipping, pp. 115, 116; Dixon, Marine Ins. 79; 1 Pritch. Adm. Dig. pp. 502, *note*, 932, pl. 717.

This definition holds good whether the ship be a general ship or a ship hired for the special purpose of the voyage.

Davis v. *Garrett*, 6 Bing. 716; 4 Moore & P. 540; 1 Pritch. Adm. Dig. p. 502, pl. 297.

Such a deviation from the usual course, even the smallest, without a justifiable necessity, discharges the underwriters.

Flanders, Maritime Law, 157 *et seq.*; Dixon, Shipping, 116; Dixon, Marine Ins. 78 *et seq.*; Dixon, Gen. Av. 247 *et seq.*; *Martin* v. *Delaware Ins. Co.* 2 Wash. C. C. 254.

Delays for saving of ships, goods, or mariners, producing uncommon risk, cannot be legal excuses on the part of the insured on policies as they are generally made. They are justified to the heart, though not (in this respect) to the law, on principles of humanity, etc.

Warder v. *La Belle Creole*, 1 Pet. Adm. 31; *Mason* v. *The Blaireau*, 6 U. S. 2 Cranch, 240, 258, *note* (2 L. ed. 266); *Bond* v. *The Cora*, 2 Wash. C. C. 80, 84; Arnould, Marine Ins. 3d ed. London, McLachlan ed. 479, 480.

Deviation is excusable only so far as it is commensurate with the danger to life, and no further.

The Argo, 1 Gall. 150, 157; *The Boston*, 1 Sumn. 328, 335, 336; *The Henry Eckbank*, Id. 400, 424, 425; *Settle* v. *St. Louis Perpetual M. F. & L. Ins. Co.* 7 Mo. 379; *The Emblem*, 2 Ware (Davies) 61, 64, 65; *A Box of Bullion*, 1 Sprague, 57, 60; *Crocker* v. *Jackson*, Id. 141–143; *Sturtevant* v. *The George Nicholaus*, Newb. Adm. 449, 452.

And it is to such emergencies that the rule seems to be limited.

1 Arnould, Ins. 152; Phil. Ins. 1027; 3 Kent, Com. 313, *note* 1; Cohen, Adm. 101 *et seq.*; *Crocker* v. *Jackson*, 1 Sprague, 141.

Even sickness of the crew constitutes no excuse for deviation unless the sickness is so great as to leave too small a force to navigate the vessel.

Arnould, Ins. 252; *Woolf* v. *Claggett*, 3 Esp. 257, 259, 260; *Winthrop* v. *Union Ins. Co.* 2 Wash. C. C. 7, 17 *et seq.*

The case of *Perkins* v. *Augusta Ins. & Bkg. Co.* 10 Gray, 312, which seeks to modify this rule, appears to be based upon a misconception of *Kettell* v. *Wiggin*, 13 Mass. 68; *The True Blue*, L. R. 1 Pr. C. 254; Abbott, Shipping, 309; *Scaramanga* v. *Stamp*, L. R. 4 C. P. Div. 318.

The contract, as sued upon, is not maritime. In England such a contract is clearly not maritime, and the apprentice has no lien for its breach.

The Sidney Cove, 2 Dodson, 11; *The Mona*, 1 W. Rob. 138; *The Riby Grove*, 2 W. Rob. 52; *The Dêcresia*, 3 W. Rob. 33; *The William Money*, 2 Hagg. Adm. 136; Abbott, Shipping, 12th ed. London, 490.

Such seems to be the law in the United States.

Plummer v. *Webb*, 4 Mason, 380.

In cases of a mixed nature it is not a sufficient foundation for admiralty jurisdiction that there are involved some ingredients of a maritime nature. The subject of the whole contract must be maritime.

See *L'Arina* v. *Manwaring*, Bee, 199; *The Fairplay*, Blatchf. & H. 136.

This court may take jurisdiction, but it will not do so, unless the voyage is ended, or the seamen have been dismissed or treated with great cruelty.

The Belgenland, 114 U. S. 355 (29 L. ed. 152); *The Carolina*, 13 Fed. Rep. 424; *The Montapedia*, Id. 427.

This suit is in contract, and not in tort, as was the case in *The Noddleburn*, 28 Fed. Rep. 835, 30 Fed. Rep. 142, nor is its subject-matter *communis juris*, like collision, as in *The Belgenland*, 114 U. S. 355 (29 L. ed. 152).

The case would seem to be within the principle laid down by Waite, *Ch. J.*, in *Wildenhus's Case*, 120 U. S. 1 (30 L. ed. 565).

The articles in suit are made, as appears from their margin, in pursuance of 17 and 18 Vict. chap. 104. This is what is known as the Merchant Shipping Act of 1854. Section 190 of chap. 104 is found in Abbott on Shipping, 12th ed. at p. 674, and is to be taken, under the decisions already cited when discussing the admissibility of the log in evidence, and especially *The Johann Friederich*, 1 W. Rob. 36, and *The Belgenland*, 114 U. S. 355 (29 L. ed. 152), as part of the contract of apprenticeship.

Such stipulations in mariners' contracts are valid.

See *Thompson* v. *The Catharina*, 1 Pet. Adm. 104; *Bucker* v. *Klorkgeter*, 1 Abb. Adm. 402; *The Atlantic*, Id. 451; *The Wilhelm Frederick*, 1 Hagg. Adm. 138.

The admiralty Rules from 12 to 20, both inclusive, relating to the joinder of causes of action, do not apply to cases not therein enumerated.

The Director, 26 Fed. Rep. 708; *The Alida*, 12 Fed. Rep. 343. See also *The Sabine*, 101 U. S. 384 (25 L. ed. 982); *The Atlantic* v. *The Odgensburgh*, Newb. Adm. 136; *The Guiding Star*, 1 Fed. Rep. 347; *Pratt* v. *Thomas*, 1 Ware, 427.

The existence of a lien is an essential prerequisite to a proceeding *in rem*.

The Rock Island Bridge, 73 U. S. 6 Wall. 215 (18 L. ed. 754).

It is only by holding that the expenses of "keep and cure" are in the nature of wages, and so entitled to a lien, that the courts have been able to sustain proceedings *in rem* to recover on such grounds.

Harden v. *Gordon*, 2 Mason, 541, 547; *Brown* v. *The D. S. Cage*, 1 Woods, 401, 405, 406; *Pratt* v. *Thomas*, 1 Ware, 427, 432. See also 30 and 31 Vict. chap. 124, § 7.

Misconduct or neglect by the officers in the treatment of the seaman after he was wounded in the service of the ship becomes a different and additional cause of action against the ship, and the ship may be held to consequential damages.

Brown v. *Overton*, 1 Sprague, 462; *Croucher* v. *Oakman*, 3 Allen, 185; *Moseley* v. *Scott*, 14 Am. L. Reg. (5 Am. L. Reg. N. S.) 599.

In *Brown* v. *Overton*, 1 Sprague, 462, the libel was *in personam*, and the suit against the master himself alone.

In *Croucher* v. *Oakman*, 3 Allen, 185, the action was at law and the owners were the only defendants.

The title of the case of *Moseley* v. *Scott*, 14 Am. L. Reg. 599, shows, however, that it is *in personam* and an abstract of it in *The Ben Flint*, 1 Biss. 568, and also in the same case as reported in 1 Abb. U. S. 133, bears out this assumption.

The limit of the ship's liability is, as we have there shown, "keep and cure" at the utmost.

The Lizzie Frank, 31 Fed. Rep. 477, 480, 481.

The English law is to govern upon this subject.

Liverpool & G. W. Steam Co. v. *Phenix Ins. Co.* 129 U. S. 397 (32 L. ed. 788).

A mariner's contract is a creature of the particular institutions of the country, to be applied and construed and explained by its own particular rules.

See also *The Magna Charta*, 2 Low. 136; *The City of Alexandria*, 17 Fed. Rep. 395; Abbott, Shipping, 12th ed. chap. 4, 489–491.

If the English law is to govern, and the libelant has no lien under that law, this court cannot, or should not extend his privileges in this respect.

The Maggie Hammond, 76 U. S. 9 Wall. 456 (19 L. ed. 777); *The Maud Carter*, 29 Fed. Rep. 156.

The recovery on the ground of wages, if any can be (*The Magna Charta*, 2 Low. 136), is to be reduced, under 17 and 18 Vict. chap. 104, § 243.

The damages, however, are to be estimated not under the "keep and cure" rule, but under

the terms of the contract itself. The libelant's rights to damages are therefore to be determined by that contract.

The Lizzie Frank, 31 Fed. Rep. 477, 479.

The damages would be measured most liberally by wages for one year, with such deductions as are imposed by 17 and 18 Vict. chap. 104, § 243, hospital fees, and the cost of libelant's return to England.

Burton v. *Pinkerton*, L. R. 2 Exch. 340; *Breen* v. *Cooper*, 13 Irish Rep. (C. L.) 621.

The recovery then, if any is had, should be confined to whatever injury Basquall suffered and to such expenses as he incurred prior to suit brought.

The Lizzie Frank, 31 Fed. Rep. 477, 481.

In no event can the recovery, under the English Limited Liability Act of 1862 (25 and 26 Vict. chap. 63), exceed £15 or $60 for each ton of the City of Carlisle's tonnage.

Place v. *Norwich & N. Y. Transp. Co.* 118 U. S. 468 (30 L. ed. 134).

That the English law is to govern upon the question of damages, see—

Consequa v. *Willings*, 1 Pet. C. C. 225; *Cook* v. *Moffat*, 46 U. S. 5 How. 295 (12 L. ed. 159).

Libelant had both legs broken below the knees,—decree, $600 and costs; fracture of collar bone, severe cut on the face, and a fracture of right femur,—decree, $250; the left arm was broken and the muscle torn off and the limb permanently disabled,—decree, $320.

The Explorer, 20 Fed. Rep. 135.

For partial paralysis and permanent disability, though able to follow lighter pursuits on land,—decree, $1,500.

The Edith Golden, 23 Fed. Rep. 43.

When there were four ribs broken and one fractured, and head considerably injured,—decree, $400.

The Guillermo, 26 Fed. Rep. 921.

When permanently disabled from following the sea,—decree, $1,570.70.

The Noddleburn, 28 Fed. Rep. 855.

For lifelong impairment of seaman's limb,—decree, $500.

The Vigilant, 29 Fed. Rep. 288.

For serious bodily injury,—decree, $310.

The Lizzie Frank, 31 Fed. Rep. 477.

For fractured leg,—decree, $200 and costs.

Olson v. *Flavel*, 34 Fed. Rep. 477.

A permanently disabled and suffering man—decree, $2,500 and costs.

McFarland v. *The J. C. Tuthill*, 37 Fed. Rep. 714.

To justify punitive damages against an employer for an injury by one of his servants, the tortious conduct complained of must either have been willful or so recklessly indifferent to the injured person's rights as to be equivalent to an intentional violation of them.

Milwaukee & St. P. R. Co. v. *Arms*, 91 U. S. 489, 495 (23 L. ed. 374).

The owner of a ship can never be held to answer in exemplary damages for a tort of the master.

McGuire v. *The Golden Gate*, 1 McAll. 104; and see *The Young America*, 31 Fed. Rep. 749, 753; *The General Rucker*, 25 Fed. Rep. 152, 158, 159.

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

William Basquall, a minor, by his guardian, Frederick B. Holman, brings this suit against the British bark City of Carlisle, and her master, C. D. Moore, to recover $15,000 damages, for an injury sustained by him on board said bark, and neglect and maltreatment thereafter.

The charge in the libel is shortly this: In sending the main lower topsail down on one occasion, the work was so carelessly and negligently done as to cause the starboard clew iron thereof to strike the libelant on the head and fracture his skull; and thereafter the master failed to give or procure for the libelant such medical aid and assistance as the case required, and he "was able to give and render," and maltreated and abused him.

The master admits, in his answer, that the libelant was injured as alleged, but avers that the injury was not caused by any negligence or carelessness in lowering said sail, but by the fault and carelessness of the libelant. He denies that he failed to give the libelant such medical aid and attention as the case required, and he was able to give or render, or that he maltreated or abused him; and avers, in effect, that the libelant was well cared for after said hurt.

Some thirty-six witnesses were examined—twenty-two by the libelant and fourteen by the defendant. Among these were eleven of the officers and crew of the bark, and a number of experts who were called to testify whether or not the sail was lowered in a seamanlike manner.

The evidence from the vessel is, of course, more or less contradictory. Those of the crew who remain with the bark are called by the defendant, while those who have left her are called by the libelant.

The master, mate, second mate, steward and two apprentices, who are in the last year of their service, testify for the vessel, while the cook, sailmaker and two apprentices, including the libelant, and a stowaway boy, testify for the libelant.

In weighing this evidence, I am constrained to believe that the master is not worthy of credit, and his testimony is of but little worth. The mate, George Dodd, impressed me favorably as a man. But he has been with his present employers, as man and boy, for a number of years, and may reasonably expect employment from them, in the near future, as a master. Under these circumstances, he is strongly tempted to make as good a case as he can for the vessel, which I think he has done, without going so far as to tell a downright falsehood. But he does not always remember, when I think he might.

John A. Bebb is an apprentice in the service of the vessel's owners. He has only eight months more to serve, when, if he remains with the ship, he may be examined for a mate's certificate. I think he made up his mind that he could not testify against the ship, and go home in her with safety and comfort to himself. I am convinced that he gave altogether a different account of the matter to the libelant's attorney, when he may not have thought that he would be called as a witness, from that which he gave on the witness stand. It was indeed pitiful to see the confusion and shame on the poor fellow's face as he tried to deny or explain his former utterances.

Of the rest of the crew that remain with the bark, Harry Hart, the second mate, Thomas Noble, the steward, and George Eggert, an apprentice, nothing more need be said than this, that in giving their testimony they probably did not forget that the master had it in his power to make them very uncomfortable during the remainder of the voyage, which circumstance ought not to be overlooked in estimating the value of their evidence.

The libelant is largely interested in the result of the suit. Therefore his testimony ought to be received with caution, if not distrust. But he appears to be a simple, honest lad, and I seldom, if ever, heard one in his walk in life, or any other, testify with more apparent candor and artlessness than he did. The same may properly be said of the other three boys who testified for him, Henry Carley, the stowaway, William J. Freer, an apprentice, and Lawrence Ainsworth, an apprentice left in this port by a British vessel some months ago, and a former shipmate of the libelant in a training vessel at Liverpool.

Estimating the evidence in the light of these suggestions, I find the facts as follows:

1. The libelant, a native of Dublin, whose parents reside at Stockport, Cheshire, having served two years and four months in the training ship Indefatigable at Liverpool, was on September 22, 1888, at the age of sixteen years, with the consent of the officers of said ship, voluntarily apprenticed to Peter Iredell & Sons, of Liverpool, for the term of four years, to learn the business of a seaman, and thereupon he was duly shipped on the bark City of Carlisle, a vessel of 204 feet in length and 37 feet beam, then and now owned by said Iredell & Sons, to serve thereon as such apprentice on a voyage from Liverpool to Portland, Oregon, and thence elsewhere on the Pacific coast, and back to a port of discharge in the United Kingdom.

On Monday, November 12, 1888, at 8 o'clock A. M., in latitude 24.19 south, and longitude 37.15 west, and about six degrees or 332 geographic miles east of Rio Janeiro, it being the first mate's watch on deck, in which were the libelant and Carley, it was determined to change the lower main topsail for a heavier one, as they were getting out of the tropics, whereupon the mate gave directions to prepare the sale to be lowered on deck, which was done by a seaman and the libelant and Carley, the latter two of whom cut the robands or ropes that fastened the head of the sail to the yard, and then returned to the deck.

Under the direction of the mate, the sail was clewed up or the lower corners brought up to the yard at the bunt, or middle of the sail, by means of the clewlines, the buntlines or ropes used to pull up the sail were hauled, a gantline or rope used to lower the sail was rove through a block on the crosstrees and sent down and bent around the sail and hauled taut, then the sheets and clewlines were taken off, the earings loosed, the robands cut, and the head earings brought into the gantline and then made fast, and then the sail was lowered.

The clews when hauled up were not stopped or fastened together, and when the clewlines were detached from the clew irons, the clews or lower corners of the sail fell down loose on either side of the gantline. At this time there was from a four to a six knot breeze on the starboard quarter and the yard was braced, so as to let the sail down on the port or lee side.

2. Before and at the time the sail was being furled and lowered the master was on the port side of the poop overlooking the sailmaker, who was preparing the sail to be sent aloft in the place of the one coming down. The libelant was standing on the starboard side of the vessel, just forward of the main hatch, and Carley was standing on the port side of the poop, assisting the sailmaker.

In lowering the sail the ship rolled, and the starboard clew got foul of the mainstay, and the mate, thinking it would clear itself,—he pulled over the stay by the weight of the descending sail, to the port side,—allowed it to lower until he feared that if it did clear itself, the clew iron would hit the deck and mar it, when he sang out "Hold on the gantline,"—the rope with which the sail was being lowered,—and sent the man then aloft down the mainstay to clear the clew. Before the man went down the stay the mate sang out "Stand clear," and just before the clew was let go—passed over to the port side of the stay—he said, "Look out there."

As the clew was being cleared from the stay the master called to Carley to tell the libelant to come aft, where he wanted him to help the sailmaker. Carley went forward on the port side of the vessel, and told the libelant the master wanted him. The latter started aft immediately, going quickly across the main hatch in a diagonal direction, and as he reached the after corner of the same, on the port side, the clew of the sail dropped from the mainstay, and the clew iron, an irregular shaped ring of four or five pounds weight, fastened to the corner of the sail, struck him on the right side of the head, about two thirds of the way from the ear to the crown, and fractured and depressed his skull, from the effect of which he fell senseless on the deck.

3. The mate and others who were present picked libelant up and carried him to the poop, where the steward, under direction of the master, washed the wound, cut the hair away around it, put some balsam on it, bandaged it and moistened his lips with brandy, when he was taken forward and placed in his bunk in the house on deck, and Carley set to watch him that day and during the nights following, for some three or four weeks. During the day the master took some stitches in the wound, and this is all the personal attention he ever gave the libelant while confined to the house, except to look into the room once a day or less and turn up his nose at the smell, and go away.

In this condition the libelant was left in an unconscious or delirious state, sweltering and rolling in his own excrement, with no regular attendant but the boy Carley at night, and such casual attention and observation as he might receive from the members of the crew during the day, until Sunday, the 18th day of November, when the master, on repeated complaint of some of the crew, permitted, rather than directed, the mate and others to wash him and put some clean burlap under him. On the next day the mate restitched the wound, the first stitches having broken out, and thereafter he

was washed at regular intervals and his personal comfort in this respect reasonably cared for; but he was stinted in his food and water, and some of what he got was furnished or obtained for him by members of the crew.

4. In about six or seven weeks from the date of his injury the libelant was "turned to" by order of the master, and kept at work on deck from 6 in the morning to 6 in the evening, for the rest of the voyage: at first making paint swabs, sennit, and then cleaning brass, scraping deadeyes, washing and sweeping decks, hauling on the braces and handling sails, in short all ordinary seaman's work except going aloft.

5. The wound on the libelant's head was still a running sore when he was set to work: at the same time he had a bad bed-sore on his buttock, another on his heel, and one on his ankle. On account of the latter two he could not wear his shoes, and in the tropics the hot deck burned his feet. From neglect, these bed sores got proud flesh in them, and finally, at the suggestion of one of the crew, the libelant went to the master and asked him "to burn" them, which he did with caustic, repeatedly. In so doing he made the libelant let down his trousers, while on the poop and needlessly expose his private parts, at the same time making brutal and indecent remarks to him on the subject.

6. In consequence of the injury to his brain, the left side of the libelant, and particularly the arm and leg, were paralyzed, so as to seriously affect the use of them during the remainder of the voyage, in addition to which his eyesight was much impaired and his perception and memory materially weakened, notwithstanding which the master required him to be on deck and at work as aforesaid, and often arbitrarily compelled him, to his great discomfort, to stand up, when the work at which he was employed admitted of his sitting down; he also habitually accosted him in a harsh, derisive and contemptuous manner, calling him a "useless bugger," a "wastrell" and the like.

7. On March 13, 1889, the vessel arrived at Portland, when the libelant had leave to go ashore in the evening, when he met a boy, the witness Ainsworth, whom he knew on the training ship at Liverpool, who took him to a boarding house and saloon kept by the witness, Mrs. Pauline Rosenburg, where he stayed all night. In the morning Mrs. Rosenburg took him down to the vessel, and with the assent of the master, took him back to her house for the purpose of taking care of him. His condition appears to have aroused her sympathy, and she endeavored to raise means to send him home direct, but failed. She then consulted counsel in the case, with a view of making the vessel send him home, and the result was the boy was sent to the Good Samaritan Hospital, and thereafter, on March 29, this suit was commenced.

8. The master failed and neglected to procure or provide any medical aid or advice for the boy after the arrival of the vessel in port, and was contriving and intending to get rid of him as easily as possible.

9. When the libelant went to the hospital his arm and leg were still partially paralized and the attendant had to cut his food for him. At the trial he appeared to have improved mentally and was able to answer the questions put to him readily and intelligibly. The wound on his head had healed over. The scar is bare of hair and about three inches long and three fourths of an inch in width, and the depression in the skull is about three eighths of an inch. He had not recovered from the paralysis of his side, and according to the testimony of the medical expert, he may never do so, but probably will on account of his youth; the doctor also thinks that the brain may accommodate itself to the depression in the skull, so that it will not be necessary or desirable to resort to the operation of trepanning; but this is at least problematical.

10. The master did nothing toward sending the libelant home at the vessel's expense, and in my judgment never intended to, and the equivocal and invalid offer made at the trial to that effect was merely made for effect; and the proposition to send the boy home as a passenger on the City of Carlisle, with her present master, considering the duration of the voyage and the treatment he was likely to receive in the mean time, was simply inhuman.

11. The injury to the libelant was the result of the concurring carelessness of the vessel in lowering the sail without "stopping" the clews at the bunt thereof, and that of the libelant himself, in passing directly under the sail when and as he did; but his carelessness was not of that gross character, nor was it the result of such reprehensible motives or purpose, as will forfeit his right to be kept and cured at the expense of the vessel; for he might not have perceived that the clew, when cast off the stay, would reach him, as it would not if he had been on the deck instead of the hatch, in crossing which, instead of going round in front of it, he was actuated by a laudable desire to obey the command of the master with alacrity, and get to the port side of the poop, where he understood he was wanted, by the shortest way and in the least possible time.

These are the material facts in the case. Before proceeding to state the law arising thereon, it may be well to briefly advert to the testimony in support of the last finding, for over this point the chief contention of the parties was made.

The weight of the expert testimony shows that in sending down the topsail good seamanship requires that the clews, when drawn up to the bunt of the sail, should be "stopped" or tied together there. The danger of sending it down with the clews loose and the clew irons dangling about is apparent to anyone who has given any attention to the subject. The evidence also shows that in good weather when a vessel is not rolling, the sail is often sent down with the clews loose. But in such cases the vessel simply takes the chances. Then it may be said "All's well that ends well," but otherwise not.

The libelant must have been aware of the fact that the sail was being lowered with the clews loose, and that the starboard one had swung over with the roll of the vessel and got foul of the stay. He had just come down from the yard where he had been assisting in cutting the robands to let the sail loose therefrom. When called by the master he was standing on the deck just forward of the main hatch and

probably looking at the man on the stay casting the clew loose. He must have heard the mate's warning, though neither he nor Freer, who stood close beside him, was questioned on that point.

It is also true that the mate testifies he gave the first warning two minutes before the clew was cast off, and the second one one minute before; from which it may be claimed that the warning was given so long before the event as to be no warning at all. But in the nature of things the warning, if given at all, would be nearer the event than this. And when the mate speaks of one or two minutes from recollection, at this distance of time, he merely intends to convey the idea that it was a very short time—only momentary.

Besides, I think it was the duty of the libelant, under the circumstances, to "look aloft" before he undertook to cross the hatch.

But as I have found, this carelessness of the libelant is not of such a character as to deprive him of his right to be cared for and cured by the vessel. The fault which will forfeit this right must be some positively vicious conduct, such as gross negligence or willful disobedience of orders. *The Chandos*, 6 Sawy. 549, and cases there cited; *The City of Alexandria*, 17 Fed. Rep. 390.

In this latter case *Mr. Justice* Brown says (p. 395): "The only recognized qualification of the seaman's right of recovery is where the injuries have arisen from his own gross and willful misconduct." And in *Olson* v. *Flavel*, 34 Fed. Rep. 479, this court said: "Where the negligence is concurrent, or both parties are in fault, courts of admiralty will apportion the damages, or give or withhold them, in the exercise of a sound discretion, according to principles of equity and justice, considering all the circumstances of the case"—citing *The Mariana Flora*, 24 U. S. 11 Wheat. 54 [6 L. ed. 405]; *The Explorer*, 20 Fed. Rep. 135; *The Wanderer*, Id. 140; *The Max Morris*, 28 Fed. Rep. 881; *Atlee* v. *Northwestern Union Packet Co.* 88 U. S. 21 Wall. 389 [22 L. ed. 619].

There is nothing in the case to indicate that the libelant was either a negligent or willful boy, but the contrary. He appears to have stood well in the training ship, where he held some petty office, and had made such progress that he was allowed to become an apprentice and go to sea eight months before his period of training had expired. Nor do I think that the rule applicable to an experienced seaman as to skill and prudence in taking care of himself ought to be rigidly applied to a boy of sixteen years of age, a few weeks at sea, on his first voyage. He was only to receive twenty-eight pounds for four years' service; and was there to be taught and cared for, looked after in rather a paternal way.

The relation of master and apprentice is well recognized in the English law as imposing a peculiar responsibility on the master. Whether on land or water, he stands to the apprentice *in loco parentis;* so that the relation is not merely that of master and servant or master and seaman. As *Sir* Henry Hobart said in the year 1616, in *Coventry* v. *Woodhall*, Hob. 134: "The matter of putting an apprentice is a matter of great trust for his dyet, for his health, for his safety. And generally no man can force an apprentice to go out of the kingdom, except it be so expressly agreed, or that the nature of the apprenticehood doth import it, as if he be bound an apprentice to a merchant-adventurer or a saylor or the like."

And although Basquall was not directly apprenticed to the master, he was to his owners, for whom he stood and whom he represented in all this matter.

On the question of going into Rio Janeiro for surgical aid for the libelant, I do not feel warranted, on the state of the evidence as to the wind, in holding that it was the absolute duty of the master to make the deviation, though I am much inclined to think he might very properly have done so. He was six degrees east of Rio, and calling a degree of longitude at that point fifty-five and one-third geographic miles, he was about 232 miles from the port. The master says it was 600 miles. In this he is certainly mistaken and probably intentionally so. He did not say whether he meant geographic or statute miles, but probably the former. However the distance is less than 400 statute miles. With a six-knot breeze this distance might have been made in less than two and a half days, which does not seem a great delay or sacrifice to make in a voyage of five months, to save the life or mind of a boy committed to the care of the master *in loco parentis*. And later on, he might have gone into Montevideo or the Falkland Islands without going 100 miles out of his way. If the vessel was in need of a spar or topmast I doubt not he would have gone into either of these ports to replace it.

As usual in these cases of suits against British vessels in this court, objection is made to the jurisdiction because the parties and the vessel are British; and in this case, because the contract sued on [the articles of indenture] is not maritime.

And first, this suit is not brought on the articles of indenture, but on a tort committed on the high seas. The articles are mere matter of inducement, by which the relation of the libelant to the ship is shown—that of an apprentice to the owner—as the shipping articles would in the case of a similar suit by a seaman. Besides, the articles of indenture are just as much a maritime contract as the shipping articles. They are both contracts executed on land to be performed on sea.

New England M. Ins. Co. v. *Dunham*, 78 U. S. 11 Wall. 1 [20 L. ed. 90]; Ben. Adm. 261.

Before taking this apprentice to sea the master was required by § 145 of the British Merchant Shipping Act of 1854, to cause him to appear before the person before whom the crew was engaged, and there produce the indenture; and the name of the apprentice with the date of the indenture, and the name of the port at which it was registered, was then entered on the "agreement" with the seaman. Thereupon he was duly shipped as an apprentice on the City of Carlisle for the voyage mentioned in the "agreement" or shipping articles, and has the same remedy against the master or vessel for any injury or wrong sustained by him during the voyage as any other member of the crew; and this in addition to any right of action he may have against Iredell & Sons directly on the covenants in the articles of indenture.

Courts of admiralty in the United States have

jurisdiction of torts committed on the high seas without reference to the nationality of the vessel on which they are committed, or that of the parties to them. Such jurisdiction will, in the discretion of the court, be declined in suits between foreigners, where it appears that justice will be as well done by remitting the parties to their home *forum*. But the jurisdiction will not be declined where the suit is between foreigners who are subjects of different governments, and therefore have no common *forum*. *Bernhard* v. *Creene*, 3 Sawy. 230; *The Noddleburn*, 12 Sawy. 132; *The Belgenland*, 114 U. S. 355 [29 L. ed. 152]; Ben. Adm. § 282.

There is no reason to decline the jurisdiction in this case. To do so would be equivalent to a denial of justice. The libelant is separated from the vessel. His condition and the circumstances justified him in leaving her; and it is highly probable that the master indirectly encouraged him to do so. The vessel is not expected to reach her home port for many months yet. And if he has a remedy on the covenants in the articles of indenture, directly against the owners in England, how is he going to get there in the mean time? and when there, where will his witnesses be? The crew have all left the vessel except the officers and two apprentices, and no one can say where they will be in that time. Indeed, it is shocking to think of turning this poor helpless boy out of court in a civilized country without redress for a grievous wrong, upon the theory that he has a remedy in the courts of his own country, where it is apparent that however just may be the laws of such country and impartial their administration, such remedy is, under the circumstances, to him utterly unavailable.

As Mr. Benedict in discussing this question, well says (Ben. Adm. § 282): "Nothing within the territory of a nation is without its jurisdiction. . . . All persons in time of peace have the right to resort to the tribunals of the nation where they may happen to be, for the protection of their rights. The jurisdiction of the courts over them is complete, except when it is excluded by treaty."

The official log-book was offered in evidence for the defense, on the question of the injury to the libelant and his subsequent treatment. On objection made by the libelant, it was admitted subject thereto.

The British Merchant Shipping Act of 1854 provides (§ 282) that an entry shall be made by the master in the official log-book in "every case of illness or injury to any member of the crew with the nature thereof, and the medical treatment adopted if any;" and § 285 of the same declares: "All entries made in any official log-book as hereinbefore directed shall be received in evidence in any proceeding in any court of justice, subject to all just exceptions."

But this Act does not settle the question for this court. So far as it declares the admissibility of the log-book as evidence, it is only in force in British courts. By the law of this court, the *lex fori* for the competency of evidence in a proceeding before it must be determined, and not that of Great Britain. Whart. Con. Laws, § 752. However, I think the book is admissible under our law, as prima facie evidence of the truth of the entries required by the British Act to be made therein. 1 Greenl. Ev. § 495; 1 Whart. Ev. § 648.

But the entries in the log are shown to be materially untrue and could not well have been made contemporaneous with the events to which they relate. Under no circumstances could they have any more weight, as evidence, than the master's statement on oath, as a witness, which I am constrained to consider unworthy of credit.

It is also objected that the suit "joins a libel *in personam* with a libel *in rem*." This objection comes too late on the argument. It ought to have been made, if at all, by exception to the libel before answer. And if it were well taken now and it had any merit, the court would allow the libelant to dismiss as to the master.

I had occasion to examine this subject in the case of *The Director*, 11 Sawy. 493, and the conclusion there reached was that the admiralty Rules from 12 to 20 inclusive, relating to joinder of parties or causes of suit in certain cases, do not apply to cases not therein enumerated; and that such cases may be proceeded in in this respect, under Rule 46, in such manner as the court may deem expedient for the administration of justice; and also, that where the facts of the case establish the liability of the master and give the libelant a lien on the vessel, as well, for the amount of his claim, it is proper and expedient that the proceeding against him and the vessel be joined in one libel.

This case is not within any of the admiralty rules aforesaid regulating the joinder of causes of suit, and therefore comes under Rule 46. The claim of the libelant, if established, is certainly a lien on the vessel; and a suit to enforce it may include a cause of suit against the master, arising out of the same facts. *The Clatsop Chief*, 7 Sawy. 274; Ben. Adm. §§ 396, 397.

This I believe disposes of the case, except the question of damages.

Assuming, as I do, that it was the duty of the vessel to take care of the libelant, at least to the end of the voyage, including such medical treatment as was proper and could reasonably have been obtained, as decided in the *City of Alexandria*, *supra*, in *Reed* v. *Canfield*, 1 Sumn. 195, and *The Atlantic*, Abb. Adm. 451, the damages under this head will be confined to what is necessary to make good, as far as possible, the default of the vessel in this respect.

When the City of Carlisle arrived at Portland, the master should have sent the libelant at once to a hospital, and had him examined by some skillful and well known physician. This would probably have resulted in trepanning him, when he might have been able to continue on the voyage, but most likely not; in which case he should have been sent home direct, as soon as he was able to travel.

Measured by this rule I estimate and assess these damages as follows: hospital expenses for five months at $1 per day, $150; expense of trepanning, $150; expense of journey to Liverpool, $200—in all $500. This includes nothing for pain, suffering or inconvenience resulting from the injury, whether temporary or permanent. He is entitled to wages until his return home or the end of the voyage, which will be about a year. This is £6 or $30.

In addition to this, the libelant must have damages for the gross neglect and mistreatment he received after the injury, whereby his injury and suffering were much aggravated.

In *The City of Alexandria, supra*, (395) *Mr. Justice* Brown, after stating that the ship was bound for the care of an injured seaman and wages to the end of the voyage, unless the injury arose "from his own gross and willful misconduct," says: "Misconduct or neglect by the officers in the treatment of the seaman, after he has been wounded in the service of the ship, becomes a different and additional cause of action against the ship, because a legal obligation to him then arises to afford suitable care and nursing; and if this be neglected the ship may be held to consequential damages."

On the ground of gross neglect and cruel maltreatment of the libelant since his injury, I estimate and assess the damages of the libelant at $1,000.

It may be said that this result is a hardship on the owners, who will probably have to satisfy the decree. That may be so, but Basquall's is much the harder lot of the two. And if owners do not wish to be mulcted in damages for such misconduct they should be careful to select men worthy to command their vessels and fit to be trusted with the safety and welfare of their crews, and particularly apprentice boys, during the long and perilous voyage from the North Atlantic to the North Pacific.

A decree will be entered in favor of the libelant for $1,530 and the costs of the suit.

OREGON SUPREME COURT.

P. W. PARKER
v.
WEST COAST PACKING CO., *Appt.*

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

1. *An owner of land bounded by navigable waters possesses important riparian rights.

2. By virtue of such ownership he is entitled to build wharves out to such a depth of water as will enable ships and vessels navigating it to touch at such wharves, and receive and discharge freight; and has the right to use the shore in front of his land for any purpose not inconsistent with the rights of the public.

3. He may reserve such right to himself when he conveys away the land above high-water mark to which it pertains, or grant it to others to enjoy.

4. Such right, however, is a mere incor-

*Head notes by THAYER, *Ch. J.*

NOTE.—*Riparian rights of owners bounding on navigable streams.*

The riparian owner on navigable streams, as appurtenant to his ownership, has the right to erect and maintain wharves or piers, subject to the governmental control necessary for the protection of the public. Ensminger v. People, 47 Ill. 384; Ryan v. Brown, 18 Mich. 196; Yates v. Milwaukee, 77 U. S. 10 Wall. 497 (19 L. ed. 984); Weber v. State Harbor Comrs. 85 U. S. 18 Wall. 64 (21 L. ed. 801).

The same rule applies to lands bounded by the sea or by bays. The boundary line is the high-water mark and the shore or beach is the property of the State. Hodge v. Boothby, 48 Me. 71; Mather v. Chapman, 40 Conn. 382; Dana v. Jackson Street Wharf Co. 31 Cal. 120; Storer v. Freeman, 6 Mass. 435; Com. v. Roxbury, 9 Gray, 492; Niles v. Patch, 13 Gray, 254; Ledyard v. Ten Eyck, 36 Barb. 125; Cortelyou v. Van Brundt, 2 Johns. 362; Goodtitle v. Kibbe, 50 U. S. 9 How. 471 (13 L. ed. 220); Pollard v. Hagan, 44 U. S. 3 How. 212 (11 L. ed. 565).

In Massachusetts by statute the common law has been changed, and now riparian owners own up to low-water mark on navigable rivers and arms of the sea. Boston v. Richardson, 105 Mass. 358; Paine v. Woods, 108 Mass. 168; Valentine v. Piper, 22 Pick. 94.

By the common law of Massachusetts the grantee of land bounding on navigable waters where the tide ebbs and flows acquires a legal right and a vested interest in the soil of the shore between high and low water mark, and not a mere indulgence or gratuitous license, given without consideration, and revocable at the pleasure of the grantor. See Austin v. Carter, 1 Mass. 231; Com. v. Alger, 7 Cush. 71; Boston v. Lecraw, 58 U. S. 17 How. 451 (15 L. ed. 121).

But the right of the littoral proprietors under the Ordinance of 1641, § 3, has always been subject to this rule: that until he should build upon his flats or inclose them, and whilst they are covered with the sea, all other persons have the right to use them for the ordinary purposes of navigation. So long as the owner of the flats permits the sea to flow over them, the individual right of property in the soil beneath does not restrain or abridge the public right. Com. v. Alger, 7 Cush. 75; Boston v. Lecraw, 58 U. S. 17 How. 431 (15 L. ed. 121).

In determining the exact location of the low or high water mark reference is had to the ordinary or medium rise and fall of the water. Com. v. Roxbury, 9 Gray, 451; Teschemacher v. Thompson, 18 Cal. 21; Martin v. O'Brien, 34 Miss. 21; Stover v. Jack, 60 Pa. 339; Tinicum Fishing Co. v. Carter, 61 Pa. 21; Wood v. Appal, 63 Pa. 221; Com. v. Alger, 7 Cush. 63.

Ordinarily where the tide ebbs and flows, the title to the bed of the stream is in the State. Com. v. Chapin, 5 Pick. 199; Keyport & M. P. Steamboat Co. v. Farmers Transp. Co. 18 N. J. Eq. 13; Cobb v. Davenport, 32 N. J. L. 369; People v. Tibbetts, 19 N. Y. 523; Smith v. Levinus, 8 N. Y. 472; Flanagan v. Phila. 42 Pa. 219; The Magnolia v. Marshall, 39 Miss. 109.

Prior to the Revolution, the shore and lands under water of the navigable streams and waters of the provinces at war with Great Britain belonged to the King of Great Britain, as a part of the *jura regalia* of the Crown, and devolved to the States by right of conquest. The land remained subject to all other public uses as before, especially to those of navigation and commerce, which are always paramount to those of public fisheries. Stockton v. Baltimore & N. Y. R. Co. 32 Fed. Rep. 9; 1 Inters. Com. Rep. 411.

Title to land under water, and to the shore below ordinary high-water mark, in navigable rivers and arms of the sea, was, by common law, vested in the sovereign. Barney v. Keokuk, 94 U. S. 324 (24 L. ed. 224); Smith v. Maryland, 59 U. S. 18 How. 71 (15 L. ed. 269).

In England only tide waters were regarded as

See also 7 L. R. A. 722; 8 L. R. A. 559; 13 L. R. A. 411; 21 L. R. A. 62.

poreal hereditament, and the possession of it cannot be recovered from a usurper by an action in the nature of an ejectment.

5. **Where S., who owned a donation land claim,** bounded by high-water mark on the tide-waters of the Columbia River, laid off a block in front of his claim, extending beyond low-water mark, and sold lots therein to the defendant, but reserved in the deed of conveyance all the hereditaments, appurtenances, franchises, and wharfing privileges, fronting on the north of the northern boundary line thereof, which hereditaments, appurtenances, etc., he subsequently granted to the plaintiff; and the defendant, disregarding said reservation, built and erected structures in the navigable waters of the river in front of the northern boundary line of the lots purchased.—*Held*, that the plaintiff had no such tangible interest in the land and water where the structures were situated as would enable him to recover it in an action for the recovery of the possession of real property.

(May 3, 1889.

APPEAL by defendant from a judgment of the Circuit Court of Clatsop County in favor of plaintiff in an action of ejectment. *Reversed.*

Statement by **Thayer,** *Ch. J.:*

The respondent commenced an action in said circuit court against the appellant, a private corporation, ostensibly to recover the possession of real property. He alleged in his complaint that he was the owner in fee and entitled to the immediate possession of all the tide-land, water frontage, wharfing rights, and privileges north of, in front of, and adjacent to the north line of lots 4, 5, and 6, in block 149, of the Town of Astoria, as laid out and recorded by J. M. Shiveley, in Clatsop County, Or.—said tide-land, water frontage, wharfing rights and privileges being bounded on the north by the ship's channel of the Columbia River. That the north line of said lots 4, 5, and 6 is parallel to and 300 feet north of the north line of Hemlock Street, in said Town of Astoria. That more than six years ago appellant wrongfully, and against the consent of respondent, entered into the possession of said premises, and wrongfully withholds them from respondent. The appellant filed an answer to the said complaint, denying the respondent's ownership of the premises therein described; denied that there was any tide-land whatever north, or in front of or adjacent to the north line of said lots, 4, 5, and 6, or either or any part thereof; denied that the north line of said lots was only 300 feet north of the north line of said Hemlock Street, but alleged that it was in the ship's channel of the Columbia River; denied the wrongful entry, possession, and withholding of the premises. The appellant, for a further answer, alleged that the south line of lots 4, 5, and 6 was north of and beyond the line of extreme low tide in said river. That all the land lying between ordinary high and low tide line of said river, at said point, was between the south and north lines of lots 7, 8, and 9, of said block 149; and appellant, during all the time alleged in the complaint, was the owner

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navigable. This rule has been adopted in many of the States of this country; and in them the public title to beds and shores of navigable streams is confined to tide waters. Barney v. Keokuk, 94 U. S. 324 (24 L. ed. 224).

Navigable waters, what are. See The City of Salem, 2 L. R. A. 380; Harold v. Jones (Ala.) 3 L. R. A. 406, and *notes*.

Rights of riparian owners. See Ulbricht v. Eufaula Water Co. (Ala.) 4 L. R. A. 572, and *note*. See also Fulmer v. Williams, 1 L. R. A. 604, 122 Pa. 191; Green & B. R. Nav. Co. v. Chesapeake, O. & S. R. Co. (Ky.) 2 L. R. A. 540; Haines v. Hall (Or.) 3 L. R. A. 611.

Rule in various States.

District of Columbia.

The compact between Virginia and Maryland of 1785 secured to their citizens "the privilege of making and carrying out wharves" on the shores of the Potomac only so far as they were "adjoining their lands." Potomac Steamboat Co. v. Upper Potomac Steamboat Co. 109 U. S. 672 (27 L. ed. 1070).

In California.

The erection of a wharf by an owner of a lot on the bay was not only an interference with the rightful control of the city over the space occupied by it, but was an encroachment upon the soil of the State, which it could remove at pleasure. Weber v. State Harbor Comrs. 85 U. S. 18 Wall. 57 (21 L. ed. 798).

Where a patent issued on a conferred Mexican grant describes the land conveyed as bounded by a navigable river, the title extends only to the edge of the stream, though a portion of the river between an opposite island and the mainland be not navigable. Packer v. Bird, 71 Cal. 134.

Under the California statutes, a title to a lot on the Bay of San Francisco was in subordination to the contract of the city over the space immediately beyond the line of the water-front, and to the right of the State to regulate the construction of wharves and other improvements. Weber v. State Harbor Comrs. *supra.*

In Iowa.

In Iowa the true rule has been adopted, and it is held that the bed of the Mississippi River and its banks to high-water mark belong to the State, and that the title of a riparian proprietor extends only to that line. Barney v. Keokuk, 94 U. S. 324 (24 L. ed. 224).

The public authorities have the right, in Iowa, to build wharves and levees on the bank of the Mississippi below high-water mark, and make other improvements thereon necessary to navigation or public passage by railways or otherwise, without the assent of the adjacent proprietor and without making him compensation. *Ibid.*

But a railroad company, under the power of eminent domain granted by the State, cannot appropriate a pier to its own use without compensating the owner. Davenport & N. W. R. Co. v. Renwick, 102 U. S. 180 (26 L. ed. 51).

The repeal of the Act of Congress which declared the Des Moines River to be a navigable stream did not invest riparian owners with title beyond high-water mark. Chicago, B. & Q. R. Co. v. Porter, 72 Iowa, 426.

A pier erected in the navigable water of the Mississippi River, for the sole use of the riparian owner, without authority except such as may arise from his ownership of the adjacent shore, is an unlawful structure, and the owner is liable for the sinking of a barge against it in the night. Atlee v. Northwestern Union Packet Co. 88 U. S. 21 Wall. 389 (22 L. ed. 619).

Such a structure differs materially from wharves

in fee simple of lots 4, 5, 6, 7, 8, and 9, and in possession thereof, occupying the same for a salmon cannery; and, being such owner of said lots, it had the right and did extend its wharf out beyond the north line thereof, into said channel of said river, to enable boats to land thereat. The respondent filed a reply, denying the new matter, except as to the appellant's ownership of said lots, which ownership he tacitly admitted.

The parties to the action having waived a jury trial, the case was tried before the court without a jury, and the following conclusions found: "(1) That respondent is the owner of the wharfing rights and privileges north, in front of, and adjacent to the north line of lots 4, 5, and 6, in block 149, of the Town of Astoria, as laid out and recorded by J. M. Shiveley, in Clatsop County, Or., and that said wharfing rights and privileges extend to ship's channel of the Columbia River. (2) That respondent is entitled to the immediate possession of the same, and that appellant wrongfully withholds the same from respondent. (3) That respondent is damaged by such wrongful withholding in the sum of $25."

Upon which conclusions the said court adjudged that the respondent have judgment against the appellant for the possession of the wharfing rights and privileges and land covered with water between the north line of said lots 4, 5, and 6, on the south take away of the ship's channel of the Columbia River on the north; and for costs and disbursements, and said sum of $25; from which judgment said appeal is taken.

It appears from the plats of the said Town of Astoria, which is and has been for several years an incorporated city, that said block 149, as indicated thereon, is situated between Hemlock Street on the south, East Eighth Street on the east, East Seventh Street on the west, and a line parallel on the north line of Hemlock Street, and 300 feet north thereof, on the north; that the block consists of 12 lots, numbered consecutively from 1 to 6, in the north half of the block, and from 7 to 12 in the south half thereof,—the northeast lot being No. 1, and the southeast lot being No. 12; and the bill of exceptions shows that nearly the entire block is below high-water mark on the Columbia River, and about half of it below low-water mark.

The counsel for the respective parties admitted on the hearing that at the north line of lots 7, 8, and 9, and the south line of lots 4, 5, and 6, the water was two feet and six inches in depth at low tide, and eight feet and six inches in depth at high tide; and that at the north line of said lots 4, 5, and 6—the north line of the block—the water at low tide was six feet in depth, and at high tide 12 feet in depth. It also appears from the bill of exceptions that the portion of the block above high-water mark is a part of the donation land claim of John M. Shiveley, who platted the said block, and a number of other blocks similarly situated, and duly recorded such plat.

It appeared also that the board of commissioners of the State of Oregon, for the sale of school and university lands, on the 28th day of September, 1876, executed to the said John M

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or piers made to aid navigation, and regulated by city or town ordinances, or by statutes or other competent authority, and from piers built for railroad bridges across navigable streams, which are authorized by Acts of Congress or Statutes of the States. *Ibid.*

In Kansas.

A riparian owner on a navigable stream cannot maintain a suit at common law against public agents to recover consequential damages resulting from obstructing a stream in pursuance of legislative authority, unless that authority has been transcended or unless there was a wanton injury inflicted, or carelessness, negligence, or want of skill in causing the obstruction. Northern Transp. Co. v. Chicago, 99 U. S. 635 (25 L. ed. 336).

In Louisiana.

The bank of a river is not sold, but passes as an accessory of the contiguous land when sold, and the property of the bank belongs to the adjacent proprietor. Leonard v. Baton Rouge, 39 La. Ann. 275.

The City of New Orleans has the right of building levees and wharves on the banks of the Mississippi River, within its corporate limits, for the public utility,—with the exceptions established by paramount law,—and of collecting reasonable wharfage for their use. New Orleans, M. & T. R. Co. v. Ellerman, 105 U. S. 166 (26 L. ed. 1015).

In Massachusetts.

Persons owning the whole of the soil constituting the bed and banks of a stream are entitled to the whole rights and profits of the water opposite their land, whether the water is used as a power to operate mills and machinery, or as a fishery, subject to the implied condition that they shall so use their own right as not to injure concomitant rights of another riparian owner, and to such regulations as the Legislature of the State shall prescribe. Holyoke Water-Power Co. v. Lyman, 82 U. S. 15 Wall. 500 (21 L. ed. 153).

By the common law of Massachusetts, the grantee of land on navigable waters where the tide ebbs and flows is owner of the soil between low and high water mark. Boston v. Lecraw, 58 U. S. 17 How. 426 (15 L. ed. 118).

He may build upon and inclose it. But while covered with the sea, the public have the right to use it for purposes of navigation. *Ibid.*

The owner, in such a case, has a right to reclaim such land by wharfing out or making erections thereon beneficial to himself. *Ibid.*

Damage to another from such reclamation is *damnum absque injuria*. *Ibid.*

Where such a proprietor owns the land on one side only of the stream, his right extends only to the middle thread of the stream, as at common law. Holyoke Water-Power Co. v. Lyman, *supra*.

Public right of navigation over land between high and low water mark where the soil belongs to the adjoining proprietor, is defeasible. Boston v. Lecraw, *supra*.

In constructing and repairing a highway, the public has the rights of a land-owner as regards watercourses within the highway limits. Nealley v. Bradford, 5 New Eng. Rep. 515, 145 Mass. 561.

If the defendant, being the owner of the soil, laid out a street on his land between high and low water mark, the right to use it became appurtenant to the lands of the adjoiners; and anything which obstructs such right is a nuisance. Richardson v. Boston, 60 U. S. 19 How. 263 (15 L. ed. 639).

In Michigan.

The principles governing the rights of riparian proprietors do not apply to a grant of land border-

Shiveley a deed in the name of the State, conveying to him, among other tide-lands, all the tide-land embraced in said block No. 149, and extending to the centers of the streets east and west thereof.

It further appeared that on the 7th day of August, 1879, the said J. M. Shiveley and Susan M. Shiveley, his wife, R. Cyrus Shiveley, and Milton Elliott, duly executed a deed to one A. W. Cone, whereby they conveyed to the said Cone all their right, title, and interest in and to lot 7, in said block 149; that said deed contained the following clause: "And it is hereby stipulated and agreed, by and between the said John M. Shiveley and A. W. Cone, that all the hereditaments, appurtenances, franchises, and wharfing privileges, fronting on the north of the northern boundary line of said lot 7, are expressly reserved out of this conveyance."

And it further appears that said Shiveley and wife on the 23d day of October, 1879, executed a deed to August Olson, purporting to convey to him lots Nos. 8 and 9, in said block 149, which deed contained a like clause of reservation as that in the former one.

It further appears that on the 30th day of October, 1879, the said Shiveley and wife executed a deed to the appellant, conveying to it their right, title, and interest in lots Nos. 4, 5, and 6, in said block 149, which also contained a like clause of reservation.

It further appeared in evidence that the said Shiveley, on the 24th day of September, 1887, executed to the respondent a deed purporting to convey to him lots 1, 2, and 3, in said block 149, together with all the tide-land, water frontage, wharfing rights and privileges in front of said lots, and northerly thereof to the ship's channel of Columbia River; and also all the tide-land, water frontage, wharfing rights, or privileges in front of said lots 4, 5, and 6, in said block 149, northerly thereof to said channel of said river.

It was admitted by the respondent at the trial in the circuit court that said lots 7, 8, and 9, described in the deed to Cone and Olson, were subsequently conveyed by them to the appellant; and that the appellant owned all of said lots 4, 5, 6, 7, 8, and 9, in said block 149, and which constitute the west half thereof.

Messrs. **Fulton Bros.,** for appellant:

Chancellor Kent says: "A reservation is a clause in a deed whereby the grantor reserves some new thing to himself out of the thing granted, and not *in esse* before; but an exception is always a part of a thing granted, or out of the general words and description in the grant. It is repugnant to the deed and void if the exception be as large as the grant itself. So it is if the excepted part was specifically granted, as if a person grant two acres, excepting one of them."

4 Kent, Com. 468.

In Devlin on Deeds, 980, it is said: "Words of reservation may operate as an exception, and to have any effect must do so when the subject of the reservation is not something newly created, as a rent or other interest, strictly incorporeal, but is a thing corporate and *in esse* when the grant is made."

What did Shiveley sell? What could he by any possibility sell other than a wharfing right? Such being the fact, when he attempted to reserve or except the wharfing right was not the exception as large as the grant, and therefore void?

3 Washb. Real Prop. 370; *Pike* v. *Monroe*, 36 Me. 309, 58 Am. Dec. 751; *Pynchon* v. *Stearns*, 11 Met. 312, 45 Am. Dec. 210.

We also contend that even if Shiveley has any right in the premises, it is but a franchise and that ejectment cannot be maintained therefor.

Taylor, Ejectments, p. 41.

Mr. **J. Q. A. Bowlby,** for respondent:

Wharfing rights are property subject to purchase and sale.

Parker v. *Taylor*, 7 Or. 435; *McCann* v. *Oregon R. & Nav. Co.* 13 Or. 459, 463, 465.

Wharf rights being subject to sale are also subjects of reservation.

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ing on a lake and marsh. The grantee, by his patent, takes to the lines of his fractional division. Palmer v. Dodd, 7 West. Rep. 797, 64 Mich. 474.

In Minnesota.

The title to the lands bordering on navigable streams, under title derived from the United States, stops at the stream, and all such streams remain public highways. St. Paul & P. R. Co. v. Schurmeier, 74 U. S. 7 Wall. 272 (19 L. ed. 74).

In Missouri.

The Act of Congress providing for the admission of Missouri into the Union left the rights of riparian owners on the Mississippi River to be settled according to the principles of state law. St. Louis v. Myers, 113 U. S. 566 (28 L. ed. 1131).

The eastern boundary of the City of St. Louis is the eastern boundary of Missouri in the middle of the channel of the Mississippi River. St. Louis Public Schools v. Risley, 77 U. S. 10 Wall. 91 (19 L. ed. 859); Jones v. Soulard, 65 U. S. 24 How. 41 (16 L. ed. 604).

Where a street or passageway was permanently established, for public use, between the river and a block of land, when the town was laid out, the owners of that block were not riparian proprietors of the land between it and the river. St. Louis Public Schools v. Risley, *supra*.

In New Jersey.

Under the New Jersey riparian laws, lands below the high-water mark of navigable waters belong to the State. Hoboken v. Pa. R. Co. 124 U. S. 656 (31 L. ed. 543).

A State may either sell or convey its title to a riparian owner or his assigns, or to a stranger, who, succeeding to its title, has no relation to the adjacent riparian owner except that of common boundary. *Ibid.*

Grantees from the State have exclusive possession of the premises against the adverse claim of a municipality to an easement over them by virtue of an assumed dedication by him of streets to the high-water mark, before he became the proprietor of the premises by grant from the State. *Ibid.*

In New York.

An owner of lands in the City of New York, fronting on the East River, has no rights whatever in respect to the lands between high and low water mark, except such as he may have derived by a grant from the owner thereof, the corporation of the City of New York. Bedlow v. New York Floating Dry Dock Co. 44 Hun, 378.

Under Acts 1849, chap. 302; 1868, chap. 305; 1880, chap. 518,—riparian owners of land on East River, in Brooklyn, were vested with the fee of the land extending to the water line of the river; they have a

Parker v. *Taylor, supra; Parker* v. *Rogers*, 8 Or. 189; *McCann* v. *Oregon R. & Nav. Co. supra; Wiggenham* v. *Kountz*, 23 Neb. 690.

Description of a lot by reference to a plat limits the grant to the lines of the lot as shown on the plat.

De Force v. *Welch*, 10 Or. 510; Tyler, Boundaries, 138, 141, 153, 166, 312.

Defendant's grantors went further and made express reservations in the conveyances to defendant of the wharf rights and franchises.

Parker v. *Taylor*, and *Parker* v. *Rogers, supra*.

To allow further evidence after a party has rested is discretionary with the court and cannot be reviewed.

Baylies, Trial Pr. p. 224; *Hunt* v. *Maybee*, 7 N. Y. 273.

Defendant cannot claim that the rights of plaintiff are so intangible that ejectment will not lie, because the boundaries are specified and defendant admits possession and a material wharf.

Jackson v. *Buel*, 9 Johns. 298; *Jackson* v. *May*, 16 Johns. 184; *Carpenter* v. *Oswego & S. R. Co.* 24 N. Y. 655; *Frisbie* v. *McClernin*, 38 Cal. 572.

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

It will be observed from the facts in this case that John M. Shiveley, the owner of a donation land claim in the Town of Astoria, fronting northerly on the Columbia River, claimed all the land and water in front of him out to what is termed the ship's channel; that he attempted to lay off such frontage into blocks, lots, and streets, recorded a plat thereof, and executed deeds of conveyance of portions of it to divers parties, who claimed ownership thereof by virtue of such conveyances; that in the several deeds to the lots in the west half of said block 149, consisting of lots 4, 5, 6, 7, 8, and 9, he inserted a sort of stipulation, reserving to himself all rights and franchises in front thereof to ship's channel, which pretended rights and franchises he subsequently undertook to convey to the respondent in this case, and that by virtue of such conveyance the latter claims the title thereto, which he is attempting to assert herein; that Shiveley, in order, I suppose, to strengthen his title to such frontage, rights, and franchises, obtained a deed from the State of Oregon to all or a large part of the tide-lands in front of his donation claim.

The appellant, it seems, after procuring the deeds from Shiveley and his grantees to the several lots referred to, did not observe the stipulation of reservation contained therein, but extended out a wharf of some kind "to ship's channel," and assumes to occupy it in defiance of the claim of Shiveley's grantees, who now attempt to eject him therefrom. This condition of affairs presents two questions: (1) whether an action to recover the possession of real property can be maintained in such case; and (2) whether Shiveley had such a tangible property right in the said frontage as enabled him to sell it out in parcels, and the purchasers thereof to acquire distinct interests therein.

That an owner of land bounded by navigable waters possesses important riparian rights by virtue of such ownership, is not open to question. *Yates* v. *Milwaukee*, 77 U. S. 10 Wall. 497 [19 L. ed. 984].

He has the privilege of building a wharf out to such a depth of water as will enable ships or vessels to touch thereat, and receive or discharge freight, and may apply such frontage to any use not inconsistent with the rights of the public. He may reserve these rights to himself when he conveys away the land above high-water mark to which they pertain, or he may grant them to others to enjoy, but in subordination to the public right of navigation. Such rights, however, are mere incorporeal hereditaments.

The land below high-water mark upon a

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superior right to build wharves and collect tolls, and may collect damages for a wrongful interference with their rights. Steers v. Brooklyn, 1 Cent. Rep. 728, 101 N. Y. 51.

In Oregon.

At the time of the platting of Astoria, Oregon, by one McClure, in 1847, the title of the land lying between high and low water mark upon the Columbia River was in the State, and could not be conveyed by a riparian owner. Hobson v. Monteith, 15 Or. 251.

In Pennsylvania.

By the law of Pennsylvania the riparian owners along the large rivers of that State own only to the bank, and have no exclusive right to the soil or water of such rivers *ad me filum aquæ*. Rundle v. Delaware & R. Canal Co. 55 U. S. 14 How. 80 (14 L. ed. 335).

In Wisconsin.

Riparian right is property, of which the owner can be deprived only if necessary that it be taken for the public good, upon due compensation. Yates v. Milwaukee, 77 U. S. 10 Wall. 497 (19 L. ed. 984).

A riparian proprietor whose land is bounded by a navigable river has the right of access to the navigable part of the river, and the right to make a landing, wharf, or pier for his own use or for the use of the public. *Ibid.*: St. Paul & P. R. Co. v. Schurmeier, 74 U. S. 7 Wall. 272 (19 L. ed. 74).

Piers or landing places, and even wharves, may be private or public, although the property may be in an individual owner. Dutton v. Strong, 66 U. S. 1 Black, 23 (17 L. ed. 29).

The right to erect the same must be understood as terminating at the point of navigability. Dutton v. Strong, 66 U. S. 1 Black, 23 (17 L. ed. 29).

The owner may have right to the exclusive enjoyment of wharves and permanent piers, or he may be under obligation to concede to others the privilege of landing their goods or of mooring their vessels there. A riparian proprietor may construct any one of these improvements for his own exclusive use or benefit. *Ibid.*

Wharves and permanent piers constructed by the riparian proprietor on the shores of navigable rivers, bays, and arms of the sea, or on the lakes, where they do not extend below low-water mark, are not a nuisance, unless they are an obstruction to navigation. *Ibid.*

A city cannot, by creating a merely artificial and imaginary dock line, deprive riparian owners of the right to avail themselves of the advantage of the navigable channel by building wharves and docks to it. Yates v. Milwaukee, *supra*.

There is the same necessity for such erections on lakes as in the bays and arms of the sea. Dutton v. Strong, *supra*.

navigable river, and which constitutes a part of its bed, belongs to the State in its sovereign capacity, subject to the riparian rights of the owner of the land above and adjacent thereto. The State, however, cannot sell it, nor can the State control its use except to increase the facilities for navigation and commerce. Nor can the riparian proprietor grant such land, or any right thereto, except such right as he himself is entitled to enjoy. He can only grant the franchise as before suggested. When, therefore, Shiveley and wife executed the deed to the appellant of October 30, 1879, conveying to appellant their right, title, and interest in said lots 4, 5, and 6, they merely granted to him a part of the riparian rights which attached to the donation land claim of John M. Shiveley. The deed, whatever its form or description of premises contained therein, only operated as a grant of a right to erect structures in the interest of navigation; and if it limited such right to an enjoyment of the portion of frontage described therein, by force of said stipulation of reservation, yet Shiveley did not thereby acquire any more tangible interest in the land and water north thereof than he had before, which was not sufficient to enable him or his grantee to recover it in an action in the form of the one brought.

An action in the nature of ejectment will not lie to recover possession of an incorporeal thing, as no possession can be given of such species of property. If the respondent, therefore, has a right to erect wharves or other structures in the interest of navigation, north of said lots 4, 5, and 6, and the appellant has infringed upon the right, he must seek some other mode of redress. Whether he has such right, however, is not necessary for us to decide in this case; but, even if he has, he certainly cannot recover it in an action to recover the possession of real property, and that is decisive against his right of action, and no other question need be considered.

The judgment appealed from must be reversed, and the case remanded to the Circuit Court, with directions to dismiss the complaint.

UNITED STATES COURT OF CLAIMS.

HOWES & CO.
v.
UNITED STATES.

WELLS *v.* UNITED STATES.

(....Ct. Claims....)

1. **Assignments of claims against the United States,** made before the issuing of a warrant for payment, except when made in a general transfer of the claimant's property by operation of law, or by voluntary transfer of all his property for the benefit of his creditors, are void. U. S. Rev. Stat. § 3477.

2. **Where, in an action against a debtor,** in a state court, a receiver of a claim of the debtor against the United States was appointed, and the state court, by its decree, subrogated the receiver to the rights of the debtor in said claim and authorized him to sue the United States in the court of claims therefor, for the benefit of a single creditor, such decree of the state court has no force in this court, and a suit by the receiver therefor will be dismissed.

3. **It is the duty of the treasury department,** through the accounting officers, to settle all claims and demands by and against the United States, and in proper cases to set off one against the other, when the government is both debtor and creditor of the same party.

4. **Where two partners recovered a joint judgment** against the United States, and it paid one half thereof to one partner, and applied the other half to a judgment in its favor against the other partner, who executed a release therefor, such partners, having ratified such settlement and payments, cannot compel the United States to pay the money over again to them jointly.

5. **The debt of one partner to the United States** can, when all the partners acquiesce and agree to it, be set off against the debt of the United States to the firm of which he is a member.

(February 11, 1889.)

THE facts are stated in the opinion.

Messrs. **James Lowndes** and **J. W. Douglass** for plaintiffs.

Mr. **Heber J. May** for defendant.

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

Two adverse claimants bring their separate actions to recover the money which became payable at the treasury upon judgments recovered in the Court of Commissioners of Alabama Claims. They are, on the one side, George Howes & Co., the judgment creditors, and on the other George R. Wells, receiver.

In 1882 the Nevada Bank of San Francisco recovered judgment against George Howes & Co. in the Superior Court of the City and County of San Francisco for a large amount. The judgment remaining unsatisfied, the creditor bank filed a supplementary petition in said case praying for the appointment of a receiver of the claims of George Howes & Co. against the United States for their undistributed portion of the Geneva Award money, which they were prosecuting before the Court of Commissioners of Alabama Claims. Upon this petition the court entered a decree November 6, 1885, set out in finding 3, appointing said Wells receiver, and subrogating him to all rights, duties, powers, and privileges of said Howes & Co. in the matter of the two claims against the United States pending before said commissioners, and authorizing him to intervene or interplead before said commissioners, and to take all steps to recover and collect said claims and to reduce the same into possession.

The receiver thereupon moved in the Court of Commissioners of Alabama Claims for leave to intervene and to have judgments in said claims entered in his favor, but the court overruled the motion and gave judgment in favor of George Howes & Co.

When the comptroller of the treasury was

about to state accounts on the judgments, the receiver appeared before him also and asked to intervene as the rightful claimant, and to have the accounts stated in his favor, but the comptroller refused to recognize any rights on his part, and stated the accounts in favor of the Howes. Before both the comptroller and the Court of Commissioners of Alabama Claims the Howes appeared and resisted the motions of the receiver. The same issue between the parties, which has twice been decided elsewhere, is again raised here, and we are now required to pass upon it.

In our opinion the decrees of the Superior Court of the City and County of San Francisco, November 6, 1885, set out in finding 3, and November 28, 1887, set out in finding 9, did not operate to so transfer the claims of George Howes & Co. against the United States to the receiver as to confer upon him the legal right to have the account stated in his favor by the comptroller, and does not give him the right to present and prosecute those claims in this court.

It was not until the passage of the Act of June 5, 1882 (22 Stat. at L. 98), that individuals had any legal claim or right to share in the money acquired by the Geneva Award under treaty stipulations, except those recognized by the previous Act of June 23, 1874, chap. 459, which did not include the claims of George Howes & Co.

By the Act of 1882 the United States created and made provision for ascertaining and paying a class of claims which included those of the Howes, and it was after the passage of this Act that the proceedings in the Superior Court of the City and County of San Francisco for the appointment of a receiver were commenced. The Act, in legal effect, had made such claims demands against the United States, of which this court had jurisdiction, as was held in the case of *Weld* v. *U. S.* 23 Ct. Cl. 126, affirmed on appeal (127 U. S. 51, 32 L. ed. 62), and they had become subject to the stringent provisions of the following section of the Revised Statutes:

Sec. 3477. "All transfers and assignments made of any claim upon the United States, or of any part or share thereof, or interest therein, whether absolute or conditional, and whatever may be the consideration therefor, and all powers of attorney, orders, or other authorities for receiving payment of any such claim, or of any part or share thereof, shall be absolutely null and void, unless they are freely made and executed in the presence of two attesting witnesses, after the allowance of such a claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof.

"Such transfers, assignments, and powers of attorney must recite the warrant for payment, and must be acknowledged by the person making them before an officer having authority to take acknowledgments of deeds, and shall be certified by the officer; and it must appear by the certificate that the officer, at the time of the acknowledgment, read and fully explained the transfer, assignment, or warrant of attorney to the person acknowledging the same."

In the *Case of Lopez*, 24 Ct. Cl. we expressed our views in relation to the effect of that section upon voluntary assignments, orders, and powers of attorneys, made by persons having claims against the government; and while we held that the accounting officers of the treasury, in their discretion and for the convenience of parties, were at liberty to recognize the same when unrevoked and uncontroverted and to state accounts in favor of the assignees, we also held that the latter had no rights which made it obligatory upon those officers thus to state accounts, that the United States could not be involved in controversies between private parties, and that assignees by voluntary assignments had no rights which could be enforced in this court.

There are certain exceptions to the broad interpretation suggested by the language of the statutes which have been recognized by judicial decisions. Assignments by proceedings in bankruptcy, voluntary assignments by debtors of all their estates, and the passing of claims by operation of law to executors, administrators, and legatees, have been held not to be void under the law. *Burke* v. *U. S.* 13 Ct. Cl. 231; *Erwin* v. *U. S.* 13 Ct. Cl. 49, affirmed on appeal, 97 U. S. 392 [24 L. ed. 1065]; *Goodman* v. *Niblack*, 102 U. S. 556 [26 L. ed. 229]; *St. Paul & D. R. Co.* v. *U. S.* 112 U. S. 733 [28 L. ed. 861].

In *St. Paul & D. R. Co.* v. *U. S.* Davis (Bancroft), *J.*, speaking for this court, after reviewing the supreme court decisions, draws the following conclusions therefrom:

"From these cases we deduce the general principle that in all proceedings to which the United States is a party the courts are to maintain the statute in its integrity, as voiding all assignments of claims against the United States made before the issuing of a warrant for payment, except such as are made in a general transfer of the claimants' property by operation of law, or by a voluntary transfer of all the claimants' property honestly made by him for the benefit of all his creditors. That is the extent to which the supreme court has thus far, in the interest of equity and good conscience, lent itself to modifications of the stringent provisions of the law."

In the case of *Goodman* v. *Niblack*, *Mr. Justice* Miller delivered the opinion of the supreme court, from which we make the following extract, which is preceded in the opinion by the statement that the court had held that the statute did not include a transfer in bankruptcy:

"In what respect does the voluntary assignment for the benefit of his creditors, which is made by an insolvent debtor of all his effects, which must, if it be honest, include a claim against the government, differ from the assignment which is made in bankruptcy? There can here be no intent to bring improper means to bear in establishing the claim, and it is not perceived how the government can be embarrassed by such an assignment. The claim is not specifically mentioned, and is obviously included only for the just and proper purpose of appropriating the whole of his effects to the payment of all his debts."

From these quotations it will be seen that the courts recognize as exceptions to the operation of the statute only those assignments made necessary by the actual death of the creditor, those provided for under general laws in case of his civil death as to all his estate by proceedings in bankruptcy, and those, in analogy to the lat-

ter, made by voluntary transfer of all his property for the benefit of all his creditors. The supreme court, in its opinion in the case of *Goodman* v. *Niblack*, emphasizes the element that such a voluntary transfer by the creditor is an assignment of all his effects by printing those words in italics.

One of the obvious benefits to the United States to be derived from the statute making assignment of claims void was the right of the officers of the government to have the original creditor, or in case of death or general assignment of his estate, his successor to all his business affairs, to deal with in settling accounts, unembarrassed by controversies between him and his creditors. The value of that right is clearly shown in this very case. After appointment of this receiver, the government made a settlement with Jabez Howes, one of the original claimants, by which he released his share in the claims now in suit and ratified and confirmed the action of the accounting officers in crediting one half on a judgment debt against him and others in favor of the United States; and this was done to assist in effecting a settlement and discharge of the latter judgment. This release would not have been valid if the transfer by the California court were sustained and the Secretary of the Treasury were bound to recognize it.

The claimant, Wells, was not appointed receiver of all the partnership estate of George Howes & Co., nor of any of the separate estate of the partners. He was appointed receiver only of these particular claims against the United States, and the court undertook to transfer to him those claims alone by a decree of subrogation, with authority to intervene or interplead in the Court of Commissioners of Alabama Claims and to bring suit against the United States in the court of claims.

This proceeding was in the nature of an equitable attachment of a claim against the United States in favor of a single creditor, and the transfer of the claim to a receiver for the benefit of such creditor alone.

If attachments, subrogations and assignments, such as those relied upon by the claimant, Wells, as receiver, should be upheld, the government would not only be deprived of the right to settle with those claimants to whom it was originally indebted, whose estates became thus attached, but might also be involved in controversies between such claimants and their creditors as well as between conflicting attaching creditors in different courts, contrary to the spirit if not the letter of the law, passed to prevent frauds upon the treasury of the United States.

Should the practice of making such attachments become common, as it no doubt would if sustained, the business and responsibilities of the accounting officers would be largely extended and the liability of frauds upon the treasury by errors and otherwise would be greatly increased. For example, in the present case the parties appeared before the comptroller, and the claimants, Howes & Co., controverted the legality of the appointment of the receiver on the ground that one of the partners, George Howes, was not served with notice of the suit in California, and further they contended that the right of the receiver to intervene and prosecute this claim had been submitted to the Court of Commissioners of Alabama Claims and there decided against him, and the matter was therefore *res judicata*.

To the decree of the California court giving authority to the receiver to bring his action in the court of claims we give no force, as the laws of Congress alone determine who may bring actions in this court.

It is not within our province to consider whether or not the California court may punish the Howes for contempt of court in disobeying its orders, if it can reach them personally, nor whether or not the proceeds arising from these claims might not be held under its decrees if they should be reached by valid process of the court. We express no opinion on these questions.

The petition of George R. Wells, receiver, is dismissed.

This brings us to the consideration of the claim of Geo. Howes & Co.

When the fifth auditor stated accounts upon the judgments of the Court of Commissioners of Alabama Claims in favor of Geo. Howes & Co., and they had reached the first comptroller for his decision thereon, that officer finding a judgment in favor of the United States against Jabez Howes and others for a large sum, and nothing to show that George Howes and Jabez Howes were not equal partners in the firm of George Howes & Co., he severed their interests, and applied one half the amount due on the judgments of the Court of Commissioners of Alabama Claims to be credited to Jabez Howes, on said judgment against him, and the other half to be paid to George Howes by draft in his favor.

A full statement of that settlement was sent by the comptroller to the attorney of record of said George Howes & Co., and soon after drafts for the amounts allowed to George Howes, payable to his order, were also forwarded to said attorney. Those drafts were collected by an attorney in fact, appointed by said George Howes, who indorsed them as authorized by his power of attorney. No objection seems to have been made to that settlement by George Howes & Co. or either of the partners until this action was commenced.

It is among the general duties of the treasury department, through the accounting officers, to settle all claims and demands by and against the United States, and in proper cases to set off one against the other when the government is both debtor and creditor of the same party. *Taggart* v. *U. S.* 17 Ct. Cl. 323; *Bonnafon* v. *U. S.* 14 Ct. Cl. 489; Rev. Stat. §§ 236, 1766; Act March 3, 1875, chap. 149, Supp. to Rev. Stat. 185.

In our view of the case it is not necessary here to pass upon the question whether or not the debt of one partner to the United States can be set off against the debt of the United States to a firm of which he is one of the members, nor whether or not the comptroller stated the accounts involved in this case in exact accord with the principles of law applicable to such cases when in controversy. There is no doubt that such set-off may be valid and binding when the partners all acquiesce and agree to it, and we think they have done so in the present case.

The two partners tacitly assented to the settlement when they received notice of the statement of the account, and made no objection to it. George Howes, one of the partners, further assented when he accepted and collected the drafts, made payable to him alone, for his divided share. Had he then objected and returned the drafts or money the comptroller might have refused to consummate the settlement, and might have left the claimants to test the right of set-off in an action at law. But he chose to abide by the settlement until he secured his share of the money, and then to repudiate it. Subsequently Jabez Howes ratified and confirmed the settlement and, by an instrument under seal, released all his interest in the claim to the United States, and the Secretary of the Treasury considered that release in the settlement and compromise of another debt to the United States in which Jabez Howes and others were debtors.

So we have the assent to the settlement of both partners together, and of each partner separately, as well as the fact that each accepted its benefits.

Having successfully resisted the claim of the receiver, who was seeking to obtain the money for one of the creditors of the firm, and having ratified the settlement and payments made at the treasury, the co-partners now join hands and prosecute this suit to compel the United States to pay the money over again to them jointly.

In our opinion they have no claim in law or equity, and *their petition must be dismissed.*

Nott, *J.*, was not present when this case was argued, and took no part in the decision.

Dolores ROMERO
v.
UNITED STATES.

(....Ct. Claims....)

1. **The salary established by law** for the performance of all the duties of an office is not a measure of compensation for the performance of part only of such duties.

2. **Services required of an Indian agent,** which are of a higher order than a mere custody of property and maintaining possession until a successor is appointed, and are delicate and confidential, cannot be performed lawfully by him after his official term had expired.

3. **One claiming a salary must prove his legal title** to the office, and an officer *de facto* and not *de jure* cannot maintain an action for salary.

4. **A person appointed an Indian agent** by the President during a recess of the Senate, and afterwards nominated for that office by the President to the Senate, which adjourned without acting on the nomination, cannot recover the salary of the office from such adjournment till his successor was appointed.

(April 1, 1889.)

THE facts are stated in the opinion.

Mr. **Geo. A. Wing** for plaintiff.

Mr. **Heber J. May** for defendant.

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

On the 9th of June, 1885, during the recess of the Senate, the claimant was commissioned by the President to be agent for the Indians of the Pueblo Agency in New Mexico, to fill a vacancy then existing, to hold the office, according to the form of the commission "during the pleasure of the President of the United States for the time being, and until the end of the next session of the Senate of the United States, and no longer."

He was nominated to the Senate for appointment at the next session, but the Senate adjourned on the 5th of August, 1886, without having acted thereon. Still he continued to exercise the duties of the office until September 13, 1886, when his successor took charge of the agency and receipted for the property belonging thereto.

He has been paid the salary of the office up to the end of the session of the Senate, August 5, 1886. He brings this suit to recover the salary of the office from that date until his successor took possession.

In his petition he sets up no claim for compensation as mere custodian of public property in his possession, nor does he allege or prove any specific property intrusted to him. It may be presumed that he had some public property, but its quantity and character, and the extent of responsibility arising therefrom, do not appear. Nor does it appear what would be a reasonable compensation for anything done by him. The salary established by law for the performance of all the duties of the office would not be a measure of compensation for the performance of part only of such duties. Many of the services required of an agent are of a higher order than the mere custody of property and maintaining possession until a successor is appointed, and in some cases they are delicate and confidential. Rev. Stat. §§ 2058, 2086, 2090, Act of March 3, 1875, chap. 132, § 4; Supp. to Rev. Stat. p. 168.

Such services were undoubtedly taken into consideration by Congress in establishing the salary of the office, and went far towards increasing the amount. They could no longer be performed lawfully by the claimant after his official term had expired. The claimant must recover the whole salary or nothing, for we have no data for an apportionment even if that were admissible.

The judicial decisions are uniform, that one claiming a salary must prove his legal title to the office, and that an officer *de facto* and not *de jure* cannot maintain an action for salary. The principle is well stated in the case of *People* v. *Weber*, 89 Ill. 348: "While the acts of an officer *de facto* are valid, in so far as the rights of the public are involved, and in so far as the rights of third persons having an interest in such acts are concerned, still, where a party sues or defends in his own right as a public officer, it is not sufficient that he be merely an officer *de facto*. To do this he must be an officer *de jure*. As an officer *de facto* he can claim nothing for himself." See also *People* v. *Smyth*, 28 Cal. 21; *People* v. *Oulton*, Id. 51; *People* v. *Tieman*, 30 Barb. 193; *Bennett* v. *U. S.* 19 Ct. Cl. 388; Rev. Stat. § 1760.

Two questions arise: First, did the claimant

have a title to the office after the adjournment of the Senate? Second, if not, then is there anything in this case which takes it out of the general rule?

The Constitution provides, in art. 2, § 3, par. 3, that "the President shall have power to fill up all vacancies that may happen during the recess of the Senate by granting commissions, which shall expire at the end of their next session." The form of the commission which has been in use from an early day, probably from the beginning, emphasizes the idea of limitation by adding the words "and no longer." As was said by *Mr. Justice* Story, in *U. S.* v. *Kirkpatrick*, 22 U. S. 9 Wheat. 734 [6 L. ed. 199]: "It follows therefore, both by the enactment of law and the form of the grant, that the commission must have expired of itself at that period; that is the utmost extent to which it could reach."

Since that decision Congress has enacted provisions now contained in the following section of the Revised Statutes, in force at the time covered by the claimant's case:

Sec. 1769. "The President is authorized to fill all vacancies which may happen during the recess of the senate, by reason of death or resignation or expiration of term of office, by granting commissions which shall expire at the end of their next session thereafter.

"And if no appointment, by and with the advice and consent of the Senate, is made to an office so vacant or temporarily filled during such next session of the Senate, the office shall remain in abeyance, without any salary, fees, or emoluments attached thereto, until it is filled by appointment thereto by and with the advice and consent of the Senate, and during such time all the powers and duties belonging to such office shall be exercised by such other officer as may by law exercise such powers and duties in case of a vacancy in such office."

That section not only suspends the office itself after the end of the session of the Senate in such case until a new appointment is made, but also declares that all the powers and duties of the office shall be exercised by some other person than the one whose commission has expired. Sections 1771 and 1772, also in force in 1885 and 1886, declare penalties for violation of the provisions of that section, as well as of others of a similar character.

On this claim of holding over after the expiration of the constitutional tenure much reliance is placed upon the decision of the Supreme Court in California in *People* v. *Oulton*, 28 Cal. 44. Stratton was state librarian, whose term of office, fixed by statute, was four years. The court held that by common law officers appointed for a term of years held until their successors were appointed and qualified, and there was nothing in the Constitution or Statutes of California to change that rule of law held to be in force in that State.

In view of the Constitution and statutes of the United States, the opinions of Attorneys-General and of the supreme court, as well as the practice of the government so far as we have been able to ascertain, we do not think that any such principle of the common law has been adopted as applicable to public officers of the United States. Attorney-General Williams, in an opinion furnished to the Secretary of the Treasury, reviewed the case of *People* v. *Oulton*, and came to a different conclusion from that reached by the California court. 14 Opin. Att'ys Gen. 262.

Attorney-General Stanbery advised that the term of the secretary of the Territory of New Mexico was limited to four years, and after its expiration the incumbent of the office had no right to exercise its functions. 12 Opin. Att'ys Gen. 130.

In addition to what we have quoted from the opinion by *Mr. Justice* Story in *U. S.* v. *Kirkpatrick*, the supreme court, speaking by *Mr. Justice* McLean, said in *U. S.* v. *Eckford*, 42 U. S. 1 How. 258 [11 L. ed. 120]: "Under the Act of 1820 collectors of customs can only be appointed for four years. At the end of this term the office became vacant, and must be filled by a new appointment."

Congress also has proceeded upon the view of the law expressed in these opinions. Revised Statutes, § 2056, provided that "Each Indian agent shall hold his office for the term of four years." This was amended by enacting a substitute May 27, 1882, chap. 163, § 1, 22 Stat. at L. 87, in the same words with this addition, "and until his successor is duly appointed and qualified."

Before the passage of the latter Act, Indian agents appointed for the term of four years under the former law were never treated nor regarded by the interior department, to which they belong, as holding over after the expiration of the stated term. Hence the necessity of the Act of 1882, which would have been wholly unnecessary if the common-law rule of California were in force with reference to the public officers of the United States.

Independently of the foregoing considerations, the claimant urges that he is entitled to recover under regulations made by the President by authority of the following sections of the Revised Statutes:

Sec. 465. "The President may prescribe such regulations as he may think fit for carrying into effect the various provisions of any Act regulating Indian affairs, and for the settlement of the accounts of Indian officers."

Among the regulations prescribed by the President are the following, which took effect January 1, 1885:

Sec. 189. "The pay of a newly appointed Indian agent will commence on and include the day upon which he shall receipt to his predecessor for the public property, when he will be considered to be in actual possession of the agency; which date must be immediately reported to the Indian office."

Sec. 193. "The salary of a retiring agent will cease with the day preceding that upon which his successor assumes charge; and the successor should not receipt until after assuming charge."

The authority of the President to make regulations is subject to the condition, necessarily implied, that they must be consistent with the statutes which have been enacted by Congress, and must be in execution of, and supplementary to, but not in conflict with, the statutes. *U. S.* v. *Symonds*, 120 U. S. 49 [30 L. ed. 558].

We cannot give a construction to those regulations which would lengthen the term of of-

fice limited by the Constitution, by section 1769 of the Revised Statutes, and by the commission; nor a construction which would give to one whose commission had expired by such limitation the salary or emoluments of an office declared to be in abeyance, without any salary fees, or emoluments attached thereto, and the duties of which are to be performed by some other person as provided in said section 1769.

Further, it is not to be assumed that the President by these regulations intended to direct the payment of money from the Treasury in clear violation of the following provisions of the Revised Statutes:

Sec. 1762. "No money shall be paid or received from the treasury, or paid or received from or retained out of any public moneys or funds of the United States, whether in the treasury or not, to or by or for the benefit of any person appointed to or authorized to act in or holding or exercising the duties or functions of any office contrary to sections seventeen hundred and sixty-seven to seventeen hundred and seventy, inclusive; nor shall any claim, account, voucher, order, certificate, warrant, or other instrument providing for or relating to such payment, receipt, or retention, be presented, passed, allowed, approved, certified, or paid by any officer, or by any person exercising the functions or performing the duties of any office or place of trust under the United States, for or in respect to such office, or the exercising or performing the functions or duties thereof.

"Every person who violates any of the provisions of this section shall be deemed guilty of a high misdemeanor, and shall be imprisoned not more than ten years, or fined not more than ten thousand dollars, or both."

A more sensible construction may be given those regulations bringing them within the undoubted power of the President to make. It is that they apply only to those Indian agents whose term of office does not expire by statute until the qualification of their successors. Practically they fix the date of qualification, as the day on which the new appointee takes the last step necessary to put himself in possession of the means to perform the duties of the office. That done, the statute, not the regulation, determines to whom the salary belongs. Thus construed the regulations are reasonable and valid.

The claimant's counsel cites *Embry* v. *U. S.* 100 U. S. 680 [25 L. ed. 772], affirming the judgment of this court (12 Ct. Cl. 455), as sustaining his position. That case arose upon those provisions of the Tenure-of-Office Act which are embraced in section 1768 of the Revised Statutes, and which are in no way involved in this case.

Embry was a postmaster appointed for four years. During his term he was suspended, not removed, from office, and another person was appointed in his place and nominated to the Senate under the provisions of said section. The latter appointment not having been consented to, Embry's suspension expired at the end of the session of the Senate. He then became entitled to the office, but did not assume the duties until ten days later. In the mean time the *ad interim* officer performed the duties. As the statute expressly provides that the latter "shall, during the time he performs the duties of such officer, be entitled to the salary and emoluments of the office, no part of which shall belong to the officer suspended," this court held that the salary during that period belonged to the one who performed the duties without reference to who had the legal title to the office, and gave judgment accordingly. The supreme court adopted that view and affirmed the judgment.

No such language as that which we have quoted is found in any of the statutes involved in the present case, but all the statutes applicable to the claimant's position make directly the opposite provisions.

It may be a hardship to the claimant to deny him pay for the time he performed duties after the expiration of his term of office, and, if so, his remedy is in Congress, as suggested by the Commissioner of Indian Affairs to the Secretary of the Interior, set out in finding 6.

The petition must be dismissed.

NEW YORK COURT OF APPEALS.

Re Caroline P. T. CRAWFORD *et al.*, Exrs.

(113 N. Y. 560.)

1. Where one deposited money in a bank to the credit of his daughter, in her presence and for her personal use, and also deposited moneys in a trust company to her credit, and they were entered in the pass book which was delivered by him to her, and she subsequently drew the moneys deposited in the bank and deposited them in the trust company and they formed a part of the fund which was

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NOTE.—*What necessary to complete gift.*

In order to make a present absolute right to the money, there must have been not only an intention to make a present gift of it to him, but enough must have been done in execution of such intention to make the gift complete. Minchin v. Merrill, 2 Edw. Ch. 337; Scott v. Ford, 1 New Eng. Rep. 221, 140 Mass. 157, 166; Taylor v. New York Fire Dept. 1 Edw. Ch. 294; Sherman v. New Bedford F. C. Sav. Bank, 138 Mass. 581; Ide v. Pierce, 134 Mass. 262; Gerrish v. New Bedford Inst. for Savings, 128 Mass. 159; Cummings v. Bramhall, 120 Mass. 552, 554; Shurtleff v. Francis, 118 Mass. 154; Clark v. Clark, 108 Mass. 522; Brabrook v. Boston F. C. Sav. Bank, 104 Mass. 228; Dickeschied v. Exchange Bank, 28 W. Va. 340; Hayden v. Hayden, 3 New Eng. Rep. 83, 142 Mass. 448.

Must be a present delivery.

To establish a parol gift *inter vivos* it must be shown that the thing given was delivered accompanied by terms of present and absolute gift. Rhodes v. Childs, 64 Pa. 24; Scott v. Lauman, 104 Pa. 533; Waynesburg College's App. 1 Cent. Rep. 923, 111 Pa. 130.

When the donor retains the control of a voluntary bond or any chose in action given or assigned,

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See also 9 L. R. A. 277; 12 L. R. A. 506; 15 L. R. A. 544; 47 L. R. A. 721.

deposited by him in such company to her credit, these facts make a valid and executed gift *in præsenti* of the moneys to the daughter.

2. **Where bonds, payable to bearer, were bought by the father** and kept by him until his death, and the coupons thereof were collected by him and passed to his credit by the banker who collected them, the facts that he stated at the time he bought them that he wanted them for his daughter, and that he afterwards directed his banker to have them registered in her name and they were taken to the office of the company where her name was indorsed upon them with the date of the indorsement and the name of the transfer agent, and they were then brought back and delivered to the donor who kept them as above stated, and the donee never knew anything of the intended gift, in the absence of any delivery of the bonds to her, do not constitute a valid gift.

3. **The registering a bond in the name of another,** so as to render it non-negotiable, does not transfer the title to the latter; the title does not pass until a delivery of the bond.

4. **A legacy cannot be adeemed by a gift** made before the execution of the will in which the legacy was given.

5. **The New York Act** of 1871, chap. 84, providing for registry of bonds, seems to refer only to bonds issued and payable in such State.

6. **Where executors were authorized to sell the real estate** of the deceased and then to divide his property and to invest the same in their names as trustees, the interest on which was to be paid as directed to his daughters, and at their death the trust estate was to be paid by them as trustees, as directed by the will, this gives them the right to double commissions.

7. **A reversal will not be made** for evidence erroneously received, where, after striking out all the objectionable evidence, there remains sufficient uncontradicted and legal evidence which demands the decision made by the court below.

(June 4, 1889.)

APPEAL from a judgment of the General Term of the New York Supreme Court, Second Department, modifying a decree of the Surrogate of Orange County on a settlement of the accounts of the executors of Peter Townsend. *Modified, and as modified affirmed.*

This case is reported in 113 N. Y. 560, and 23 N. Y. S. R. 722.

Peter Townsend died in the month of September, 1885, leaving a will executed on the 8th day of August, 1883. This will was duly probated, and in December, 1886, his executors filed their account. Pending such accounting Edmund S. Hamilton, one of the executors, died, and Caroline P. T. Crawford, another of the executors, has died since the appeal to this court was taken.

There has been no further change of parties. The objectors before the surrogate raised no questions as to the correctness of the figures contained in the account, or as to the disposition of the estate that came into the hands of the executors; but it was claimed that the executors had neglected to charge themselves with certain bonds of the Shenandoah Valley Railroad and with certain moneys deposited with the Farmers' Loan & Trust Company to the credit of Caroline P. T. Crawford, amounting to $102,120.

Mrs. Crawford claimed these bonds and this

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he retains control over the gift and may cancel or destroy it. Trough's Estate, 75 Pa. 115; Waynesburg College's App. *supra.*

The fact that by the terms of the gift the enjoyment of it was postponed until after the death of the drawer did not make the instrument testamentary. Mack & Person's App. 68 Pa. 231; Hatch v. Hatch, 9 Mass. 310, and *note;* Wheelwright v. Wheelwright, 2 Mass. 447; Stephens v. Huss, 54 Pa. 20; Waynesburg College's App. *supra.* See Walsh's App. 1 L. R. A. 535, 122 Pa. 177; Bishop v. McClelland, 1 L. R. A. 551, 44 N. J. Eq. 450; *Re* Atkinson (R. I.) 3 L. R. A. 302.

A mere deposit is not a consummated gift.

The mere fact that the alleged donor deposits his own money in a bank in his own name, as trustee for another, does not establish a gift. Clark v. Clark, 108 Mass. 522; Broderick v. Waltham Sav. Bank, 109 Mass. 149; Powers v. Provident Inst. for Savings, 124 Mass. 377; Eastman v. Woronoco Sav. Bank, 136 Mass. 208; Gerrish v. New Bedford Inst. for Savings, 128 Mass. 160; Brabrook v. Boston F. C. Sav. Bank, 104 Mass. 228; Nutt v. Morse, 2 New Eng. Rep. 243, 142 Mass. 1.

There must be some further act or circumstances showing his intention to part with the control and dominion of the deposit, and to make a perfected gift of the legal or equitable interest in it to her. Sherman v. New Bedford F. C. Sav. Bank, 138 Mass. 581; Nutt v. Morse, 2 New Eng. Rep. 243, 142 Mass. 1; Walker v. Welch (Mass.) 4 New Eng. Rep. 355.

A deposit in a savings bank, of a person's own money, in the name of another, without any notice of such deposit to the person in whose name it is deposited, and with no delivery of the pass book to such person, is not a completed gift by the depositor to the person in whose name it is deposited.

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Clark v. Clark, *supra;* Jewett v. Shattuck, 124 Mass. 590; Broderick v. Waltham Sav. Bank, *supra;* Scott v. Ford, 1 New Eng. Rep. 222, 140 Mass. 157.

A deposit of money in B's name, without his knowledge, intending it as a gift, is not a perfected gift, as the assent of both parties is necessary. Peirce v. Burroughs, 58 N. H. 302; Smith v. Ossipee Valley T. C. Sav. Bank, 4 New Eng. Rep. 522, 64 N. H. 228.

A deposit by a husband, in a savings bank, of a sum of money, upon the account of both himself and his wife, is not evidence of a gift to the wife, he retaining the power to draw the money at will, and in fact drawing the interest upon it on several occasions. Schick v. Grote, 5 Cent. Rep. 826, 42 N. J. Eq. 352.

The form of the account to which the deposit was made is not evidence of gift to the wife. Brabrook v. Boston F. C. Sav. Bank, 104 Mass. 228; Brown v. Brown, 23 Barb. 565; Marshal v. Crutwell, L. R. 20 Eq. 328; Smith v. Speer, 34 N. J. Eq. 336.

Trust created by deposit of money for another's use. See *Re* Atkinson (R. I.) 3 L. R. A. 302, *note.* See generally Drew v. Hagerty, 3 L. R. A. 230, *note,* 81 Me. 231.

Equity cannot enforce a gift not enforceable at law.

Equity cannot make that good and enforceable as a gift *inter vivos* which was incomplete and not enforceable at law. Baltimore Retort & F. Brick Co. v. Mali, 3 Cent. Rep. 508, 65 Md. 93.

The leading case on this point is Antrobus v. Smith, 12 Ves. Jr. 39, in which Gibbs Crawford made the following indorsement upon a receipt for one of the subscriptions in the Forth & Clyde Navigation: "I do hereby assign to my daughter, Anna Crawford, all my right, title, and interest of and in the inclosed call, and all other calls, of my sub-

money as gifts made to her by the testator in his lifetime.

It was on these issues that evidence was taken and findings made by the surrogate.

The first and second objections raised these questions specifically.

The third stands or falls with them, being intended to apply merely to the income of these items.

The fourth and fifth objections are claimed to touch a so-called ademption of certain provisions in the will in favor of Mrs. Crawford and her children.

The surrogate held that both the bonds and the money were given and delivered to Mrs. Crawford during the lifetime of her father, and that there was no ademption of the provisions of the will in her favor.

On the settlement of the decree the executors claimed full commissions, on the theory that they were entitled to receive commissions, first as executors, and afterwards as trustees.

The other facts are stated in the opinion.

Messrs. **W. D. Shipman** and **G. L. Rives,** for appellants:

To establish a valid gift, a delivery of the subject of the gift to the donee or to some person for him, so as to devest the possession and title of the donor, must be shown.

Young v. *Young,* 80 N. Y. 422, 430.

The delivery must be such as to vest the donee with the control and dominion over the property, and to absolutely devest the donor of his dominion and control.

Jackson v. *Twenty-Third Street R. Co.* 88 N. Y. 520, 526; *Easket* v. *Hassell,* 107 U. S. 602 (27 L. ed. 500).

In *Scott* v. *Lauman,* 104 Pa. 593, one William Scott, having a certificate of deposit in his own name, indorsed it over to his brother, the plaintiff, and gave it to an attorney to keep in his safe, saying it was for plaintiff. It was held that there was no delivery, and hence no gift.

In *Flanders* v. *Blandy,* 9 West. Rep. 417, 45 Ohio St. 108, a father invested $2,000 in bonds for the benefit of his daughter, who lived at a distance. She requested him to retain the bonds for safe keeping, and they were never physically delivered to her. As there was no delivery there was no gift, although the evidence of an intention to give was beyond a doubt.

In *Sherman* v. *New Bedford F. C. Sav. Bank,* 138 Mass. 581, the deposit was made in the name of the First Congregational Society of Rochester, and the pass book was in its name, with the following condition annexed: "Interest to be paid on order of Urial Sherman. Principal to be drawn by board of managers of said church after decease of Urial Sherman." Mr. Sherman retained the book until his death. It was held there was no gift to to the church.

The delivery of the book, or other act, is the voluntary and efficient act which perfects the gift. Until that is done, even if the intention is manifested, there can be no gift.

Nutt v. *Morse,* 2 New Eng. Rep. 243, 142 Mass. 1; *Bunn* v. *Markham,* 7 Taunt. 224; *Farquharson* v. *Cave,* 2 Coll. Ch. 356; *Trimmer* v. *Danby,* 25 L. J. N. S. (Ch.) 424.

In *Young* v. *Young,* 80 N. Y. 422, deceased put bonds in an envelope on which he wrote a

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scription in the Clyde & Forth Navigation." As this was not a legal assignment, and was therefore without effect as a gift, it was argued that the father meant to make himself a trustee, for his daughter, of the shares. But *Sir* William Grant, *M. R.,* observed: "Mr. Crawford was not otherwise a trustee than as any man may be called so who professes to give property by an instrument incapable of conveying it. He was not in form declared a trustee; nor was that mode of doing what he proposed in his contemplation. He meant a gift. He says he assigns the property. But it was a gift not complete. The property was not transferred by the act. Could he himself have been compelled to give effect to the gift by making an assignment? There is no case in which a party has been compelled to perfect a gift, which, in the mode of making it, he has left imperfect. There is *locus penitentiæ* as long as it is incomplete." Flanders v. Blandy, 9 West. Rep. 418, 45 Ohio St. 108.

Where a gift is imperfect by the omission of some act or circumstance which the law requires as necessary to pass the title, it cannot be made good in equity. Baltimore Retort & F. Brick Co. v. Mali, 3 Cent. Rep. 507, 65 Md. 93; Snowden v. Reid, 8 Cent. Rep. 888, 67 Md. 130.

To constitute a valid gift, the transfer must be consummated, and not remain incomplete, or rest in mere intention; and this is so whether the gift is by delivery only, or by the creation of a third person or in the donor; enough must be done to pass the title. Martin v. Funk, 75 N. Y. 134; Gano v. Fisk, 1 West. Rep. 505, 43 Ohio St. 492.

The donor must part not only with the possession, but with the dominion and control of the property. Schick v. Grote, 5 Cent. Rep. 826, 42 N. J. Eq. 352.

An intention to give is not a gift, and so long as the gift is left incomplete a court of equity will not interfere and give effect to it. Gray v. Barton, 55 N. Y. 68; Martin v. Funk, *supra*; 2 Kent, Com. 438; Noble v. Smith, 2 Johns. 52; Pearson v. Pearson, 7 Johns. 26; Grangiac v. Arden, 10 Johns. 293; Hooper v. Goodwin, 1 Swanst. 486; Picot v. Sanderson, 1 Dev. L. 309; Pennington v. Gittings, 2 Gill & J. 208; Gano v. Fisk, 1 West. Rep. 501, 43 Ohio St. 492; Flanders v. Blandy, 9 West. Rep. 418, 43 Ohio St. 108.

If the donor retained the control over the fund until his death, intending that no title to or interest in it should pass until that time, there would be no perfected gift. Scott v. Ford, 1 New Eng. Rep. 221, 140 Mass. 157; Alger v. North End Sav. Bank, 5 New Eng. Rep. 894, 146 Mass. 418.

When an assignment professes to convey the stock to the daughter absolutely, but the gift was left imperfect for the want of an actual transfer of the stock on the books of the corporation, equity will not lend its aid to consummate the gift by directing the transfer to be made. Jones v. Lock, L. R. 1 Ch. 25; Antrobus v. Smith, 12 Ves. Jr. 46; Baltimore Retort & F. Brick Co. v. Mali, 3 Cent. Rep. 503, 65 Md. 93.

Executors; commissions, when chargeable.

The earlier decisions seem to be quite uniform in holding that commissions are only chargeable in cases where annual rests are made under the order of the court for the purpose of charging executors with interest. Vanderheyden v. Vanderheyden, 2 Paige, 287; Cram v. Cram, 2 Redf. 245; *Re* Bank of Niagara, 6 Paige, 213; Hosack v. Rogers, 9 Paige, 461; Bennett v. Chapin, 3 Sandf. Ch. 673; Fisher v. Fisher, 1 Bradf. 355.

And full commissions in all cases are allowed where accounting is made under requirements of a rule of court or by provisions of a statute. Tucker

description of the bonds, with a statement that some belonged to John N. Young and some to William H. Young, giving the numbers; and he added: "But the interest to become due thereon is owned and reserved by me for so long as I shall live. At my death they belong absolutely and entirely to them and their heirs." The bonds were kept in a safe in William's house, in which the deceased kept his papers, and to which he and both of the donees had access. This was held no gift.

The delivery must be made with the intent to vest the title of the property in the donee. The intent is a necessary element of the transaction.

Jackson v. *Twenty-Third Street R. Co.* 88 N. Y. 520, 526.

A legacy to a child is usually considered a portion, and if a parent in his lifetime advance to the child, the legacy is wholly or *pro tanto* adeemed. The burden of proving the contrary is upon the legatee.

4 Kent, Com. 11th ed. 646, *note.*

The advancement not being a performance of a covenant or satisfaction of a debt, it is presumed to be a satisfaction of the portion, although differing in some of the circumstances from the provisions of the will.

Hine v. *Hine,* 39 Barb. 507, 511; *Ex parte Oakey,* 1 Bradf. 281; *Langdon* v. *Astor,* 16 N. Y. 9, 34; *Benjamin* v. *Dimmick,* 4 Redf. 7; *Beebe* v. *Estabrook,* 79 N. Y. 246; *Alexander* v. *Alexander,* 1 N. Y. S. R. 508; *Paine* v. *Parsons,* 14 Pick. 318; *Kirk* v. *Eddowes,* 3 Hare, 509; *Dugan* v. *Hollins,* 4 Md. Ch. 139; *Hopwood* v. *Hopwood,* 7 H. L. Cas. 728; *Miner* v. *Atherton,* 35 Pa 528; *Leighton* v. *Leighton,* L. R. 18 Eq. 458; *Van Houten* v. *Post,* 33 N. J. Eq. 344; *Lawrence* v. *Lindsay,* 68 N. Y. 109.

The rule is that where a father gives a legacy to a child it must be understood as a portion, although not so described in the will. The application of the principle of ademption will not be prevented by the circumstances that the limitations of the portion under the will are widely different from the limitations of the portion under the settlement.

Durham v. *Wharton,* 10 Bligh, N. R. 526, 544, 3 Clark & F. 146; *Trimmer* v. *Bayne,* 7 Ves. Jr. 508; *Baugh* v. *Read,* 1 Ves. Jr. 257; *Monck* v. *Monck,* 1 Ball & B. 298; *Platt* v. *Platt,* 3 Sim. 503; *Barry* v. *Harding,* 1 Jones & La T. 475; *Twining* v. *Powell,* 2 Coll. Ch. 262; *Lord Chichester* v. *Coventry,* L. R. 2 H. L. 71; *Hopwood* v. *Hopwood, Ex parte Oakey,* and *Kirk* v. *Eddowes, supra; Arnold* v. *Haronn,* 43 Hun, 278.

No other or different proof is required to establish a gift of this description (*causa mortis*) than one *inter vivos.* In the one case, the gift becomes complete by delivery of the thing given; in the other by the death of the donor. In either there is no gift without delivery.

Bedell v. *Carll,* 33 N. Y. 581.

In *Johnson* v. *Spies,* 5 Hun, 468, it was held that a person claiming to be a donee was not competent to prove a gift alleged to have been made by a deceased donor, where the donor's executor was a party defendant.

See also *Tilton* v. *Ormsby,* 10 Hun, 7; *Wadsworth* v. *Heermans,* 85 N. Y. 639.

When adverse rights by succession are involved, one litigant shall not testify to a transaction with the deceased predecessor in title, invalidating or impairing the right or title of the other.

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v. McDermott, 2 Redf. 321; Ward v. Ford, 4 Redf. 44; Cook v. Lowry, 29 Hun, 34.

The Revised Statutes, in substance, enacted the rule of the court of chancery on the subject (2 Rev. Stat. 93, § 58 *et seq.*). Collier v. Munn, 41 N. Y. 147.

Where the account is rendered yearly, in compliance with any statute, or rule, or order of the court, or where annual rests are necessary to charge the party accounting with interest on the balance remaining in his hands, such accounting party is entitled to full commissions on each year's receipts and disbursements. Hancox v. Meeker, 95 N. Y. 539; Cook v. Lowry, 29 Hun, 34; *Re* Kellogg, 7 Paige, 266; *Re* Bank of Niagara, 6 Paige, 216; Hosack v. Rogers, 9 Paige, 467; Fisher v. Fisher, 1 Bradf. 336.

Even in cases of misconduct or gross negligence, it is at least doubtful whether the settled rule in this State would not require the allowance of commissions; and where no imputation of this rests upon the trustees, their title to commissions is in no doubt. King v. Talbot, 40 N. Y. 96; Rapalje v. Norsworthy, 1 Sandf. Ch. 406; Meacham v. Sternes, 9 Paige, 405.

Income to be periodically paid out.

Where the income is placed in the hands of executors to be paid periodically in part as annuities to the widow and daughter, and the balance to be divided among the children of the deceased, the executors are entitled to retain the commissions from the annual payments. Hancox v. Meeker, 95 N. Y. 539. *Re* Bank of Niagara, 6 Paige, 216; *Re* Kellogg, 7 Paige, 266; Hosack v. Rogers, 9 Paige, 467; Fisher v. Fisher, 1 Bradf. 336.

If a will directs the executor to invest a fund and allow it to accumulate for the benefit of a minor, without indicating an intention to create a separate trust, the executor holds as such, and not as trustee, and is entitled to commissions accordingly. Lansing v. Lansing, 45 Barb. 182, 1 Abb. U. S. 280, 31 How. 55.

Where offices of executor and trustee distinct.

Where, under the provisions of the testator's will, the offices of executors and trustees were distinct, the executors and trustees were entitled to full commissions in each capacity. Phœnix v. Phœnix, 28 Hun, 629; *Re* Carman, 3 Redf. 46; Hall v. Hall, 78 N. Y. 535; Hurlburt v. Durant, 88 N. Y. 121.

The executors' commissions are to be adjusted upon the aggregate sum received and paid out. Betts v. Betts, 4 Abb. N. C. 442; *Re* Kellogg, 7 Paige, 265; Valentine v. Valentine, 2 Barb. Ch. 430.

Double commissions.

Double commissions cannot be allowed on the handing over of the fund by one executor or trustee to another. Meeker v. Crawford, 5 Redf. 461; *Re* Jones, 4 Sandf. Ch. 615.

A person is not entitled to receive commissions both as executor and as trustee upon the same fund for the same time. Hall v. Hall, 78 N. Y. 535, affirming 18 Hun, 358.

So long as the characters of executor and trustee are co-existent in one person, commissions may be retained as executor only; but it is otherwise when there has been a separation of duties performed in the two capacities. Hurlburt v. Durant, 88 N. Y. 121; 2 Civ. Proc. 115.

Where a separation of the two functions of executor and a trustee has been intended by a testator, and has been in fact effected, double commissions may be allowed. Matter of Roosevelt, 5 Redf. 601.

Van Tuyl v. *Van Tuyl*, 57 Barb. 235.

Declarations of the deceased may be admitted, provided they are made at the time of the act which is alleged to constitute the gift, and form part of the *res gestæ*. No other declarations of the deceased are admissible.

See Redf. Wills, *442, *note* 13; *Kirk* v. *Eddowes*, 3 Hare, 509; *DeGroff* v. *Terpenning*, 14 Hun, 301.

The executors were properly allowed only half commissions on principal.

Johnson v. *Lawrence*, 95 N. Y. 154; *Laytin* v. *Davidson*, 95 N. Y. 263.

Messrs. **Platt & Bowers**, for respondents:

There are many English cases indicating that a delivery to the donee is not essential.

1 Gray, Cas. Prop. 165–167.

But while they apparently hold that delivery is not essential, the true legal principle that governs them was in accord with the decisions of this court.

Brinckerhoff v. *Lawrence*, 2 Sandf. Ch. 402; *Davis* v. *Davis*, 1 Nott & McC. 225; *Grangiac* v. *Arden*, 10 Johns. 293.

The effect of the registration was to bind the company to recognize Mrs. Crawford, and Mrs. Crawford only, as the owner, and after their act in so recording her as the owner, they would have been responsible to her for the value of the bonds had they transferred them without her authority.

Francis v. *New York & B. Elevated R. Co.* 17 Abb. N. C. 1; *Grymes* v. *Hone*, 49 N. Y. 17, 22; *De Caumont* v. *Bogert*, 36 Hun, 382; *Jones* v. *Farrell*, 1 De G. & J. 208; Addison, Cont. 6th ed. 821; *Sargent* v. *Essex Marine R. Corp.* 9 Pick. 202; *Cecil Nat. Bank* v. *Watsontown Bank*, 105 U. S. 222 (26 L. ed. 1042).

Nor was it essential that this assignment should have been communicated to the assignee.

Sharpless v. *Welsh*, 4 U. S. 4 Dall. 279 (1 L. ed. 833).

The rule is that to consummate the gift there must be such a delivery by the donor to the donee as will place the property within the dominion and control of the latter with intent to transfer the title to him.

Gray v. *Barton*, 55 N. Y. 72.

Kent says (2 Kent, Com. 439) that in this, as in every other case, delivery must be according to the nature of the thing.

Champney v. *Blanchard*, 39 N. Y. 111, is an authority for the position that to constitute a gift a manual delivery of the thing given is not necessary, nor need it be present in all cases.

In *Westerlo* v. *De Witt*, 36 N. Y. 340, it was held that delivery of a certificate of deposit unindorsed with intent to transfer to the donee the money therein specified was sufficient to constitute a valid gift of such money.

Thus in *Grymes* v. *Hone*, 49 N. Y. 17, the testator made an absolute assignment, in writing, of twenty shares to the plaintiff. The assignment was only for a portion of the number of shares covered by the certificate. He handed it to his wife to be kept by her and delivered to the plaintiff on his death. It was held that the gift was valid.

See also *Hunter* v. *Hunter*, 19 Barb. 638; *Whiting* v. *Barrett*, 7 Lans. 109; *Martin* v. *Funk*, 75 N. Y. 134.

In *Richardson* v. *Richardson*, L. R. 3 Eq. 5 L. R. A.

686, it was held that an instrument executed as a present and complete assignment (not being a mere contract to assign at a future day) is equivalent to a declaration of trust.

See *Morgan* v. *Malleson*, L. R. 10 Eq. 475.

In *Martin* v. *Funk*, 75 N. Y. 140, *Judge* Church further says, referring to the above cases: "These cases are commented upon, and the latter somewhat criticised in *Warriner* v. *Rogers*, L. R. 16 Eq. 340; but *Sir* James Bacon, in delivering the opinion, substantially adheres to the general rule before stated. In *Exparte Pye*, 18 Ves. Jr. 140, money was transmitted to an agent in France to purchase an annuity for a lady. Owing to circumstances, he purchased it in the name of the principal. When the latter learned this fact, he executed and transmitted to the agent a power of attorney to transfer the annuity, but before its arrival the principal died. *Lord* Eldon held that a declaration of trust was established.

"*Wheatley* v. *Purr*, 1 Keen, 551, is quite analogous to the case at bar. A testatrix directed her brokers to place £2,000, in the joint name of the plaintiffs and herself as a trustee for the plaintiffs. The sum was placed to the account of the testatrix alone, as trustee of the plaintiffs, and a promissory note given by them to her as such trustee. The note remained in her possession until death, when her executor received the money. It was held that the transaction amounted to a complete declaration of trust."

To create a trust the acts or words relied upon must be unequivocal, implying that the person holds the property as trustee for another.

Young v. *Young*, 80 N. Y. 422; *Martin* v. *Funk*, *supra*.

This doctrine of retaining possession by the donor as agent or trustee for the donee can only apply where such retention is inconsistent with the use and enjoyment of the chattel on his own behalf.

See *Armitage* v. *Mace*, 96 N. Y. 538.

This is a question of fact to be determined by a jury or by the court, as the case may be, upon the evidence produced. In other words, the registration was intended to, and did transfer to her not only the bonds, but the interest; and the fact that he collected the interest not being inconsistent with his agency, should not be held to be conclusive against Mrs. Crawford's then ownership of the bonds.

Doty v. *Wilson*, 47 N. Y. 584; *Fulton* v. *Fulton*, 48 Barb. 591.

Where words are unambiguous they cannot be departed from merely because they lead to consequences which may be considered capricious or even harsh or unreasonable.

Abbott v. *Middleton*, 7 H. L. Cas. 89; *Gordon* v. *Gordon*, L. R. 5 H. L. 284.

The doctrine of inofficious testaments invoked from the civilians has no place in our law. A man has a right to make whatever disposition of his property he chooses, however absurd or unjust.

Earl of Sefton v. *Hopwood*, 1 Fost. & F. 578.

The right of a testator to dispose of his estate depends neither on the justice of his prejudice nor the soundness of his reasoning. He may do what he will with his own.

Clapp v. *Fullerton*, 34 N. Y. 192; *Arnold* v.

Haronn, 43 Hun, 278; *De Caumont* v. *Bogert*, 36 Hun, 391; *Doty* v. *Willson*, 47 N. Y. 580; 2 Wms. Exrs. 1070.

The least expression in the will, or elsewhere, to the contrary defeats the presumption of an advance to a child; and it is upon this doctrine that the authorities have gone in permitting entries in books subsequent to the execution of a will to be read, as showing what advances the testator intended should be charged against the share of a child and what not.

2 Wharton, Ev. 3d ed. § 1003 *a*.

The authorities holding that, no matter how strong the intention to make a gift, the court will not enforce it where there is no delivery, have no bearing on this case, because here there was a delivery.

Flanders v. *Blandy*, 9 West. Rep. 417, 45 Ohio St. 108; *Shuttleworth* v. *Winter*, 55 N. Y. 624.

The decision in *Sherman* v. *New Bedford F. C. Sav. Bank*, 138 Mass. 581, is apparently in some of the principles of law stated in variance with the New York cases.

And so in *Nutt* v. *Morse*, 2 New Eng. Rep. 243, 142 Mass. 1, the court defeated the gift because of the fact, as found, that it was intended to have taken place as a testamentary disposition, and was an attempt to evade the Statute of Wills.

Nor is the case of *Trimmer* v. *Danby*, 25 L. J. N. S. (Ch.) 424, inconsistent with the position for which we contend. That case is much like *Young* v. *Young*, 80 N. Y. 422.

The executors are entitled to commissions as executors on all funds received and paid out by them, including the balance paid over by them to themselves as trustees.

In the first case double commissions are allowed; in the second, only one set of commissions.

The surrogate misapplied the test to the facts of this case, and, as stated in his opinion, followed *Johnson* v. *Laurence*, 95 N. Y. 154, instead of *Laytin* v. *Davidson*, 95 N. Y. 263.

The general term, however, corrected this error and followed the decisions in *Laytin* v. *Davidson*, 95 N. Y. 263.

In *Laytin* v. *Davidson*, *supra*, the testator devised his real and personal property to his executors in trust to pay debts and legacies and to construct a burial vault, and upon the further trust in substance to divide the residue.

The opinion of the court of appeals affirmed a general term decision (see 29 Hun, 622), which reversed a decision of the surrogate of Westchester County, holding that the executors could only have commission in one capacity, reported *sub nom.* *Mecker* v. *Crawford*, 5 Redf. 450.

The decisions that have been rendered by this court since the two decisions in 95 N. Y. are also strongly in support of the present claim.

Re Mason, 98 N. Y. 527; *Phœnix* v. *Livingston*, 2 Cent. Rep. 385, 101 N. Y. 451.

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

We agree with the courts below in regard to the deposit of moneys in the bank, and subsequently in the trust company. There was an executed gift, completed by a full delivery of the subject thereof and a change of title therein. The surrogate has found that the donor made the first deposit to the credit of Mrs. Crawford in the bank in her presence, and for her personal and specific use. The subsequent deposits he also finds were made by the donor in the trust company to the credit of Mrs. Crawford, and they were entered in a pass book supplied by the company, which book was delivered by the donor to her. There was evidence sufficient to authorize such findings. The donor thus parted completely with the title to the moneys which he deposited, and the same became subject to the exclusive and entire control of the donee, and were legally and in fact in her full possession. She herself drew the $30,000 which had been deposited to her credit in the bank, and they were deposited in the trust company, and formed part of the whole fund which was from time to time deposited by the donor in such company to her credit. There was nothing more that could have been done in order to clothe the donee with the absolute and full title and control of the moneys thus deposited, and nothing more was necessary to complete a valid and irrevocable gift.

It is very probable that one of the motives which prompted the first deposit on the part of the donor was that the donee should have some money in the house in case he should be taken away. One of the witnesses testified that the donor so stated in his presence. But the evidence is, as we think, entirely insufficient to show that the gift of the $30,000 was only upon the condition that it should not take effect until his death. Nor can the subsequent deposits, in the light of the evidence, be regarded as a gift only upon that condition. Within all the authorities, the facts make a valid and executed gift *in præsenti* of the moneys in question.

But we cannot assent to the decision of the court below, which holds the bonds to have been effectually disposed of by the intending donor in his lifetime by a valid gift, completed by delivery to Mrs. Crawford, or to anyone for her as her agent. We do not think there was any such delivery. He may have intended the bonds as a gift, but his intention was never, as we think, effectually carried out. They were coupon bonds payable to bearer; and were bought by the direction of the donor by his broker, and delivered to the donor, and kept by him up to the time of his death. There was a book found among his effects after his death which purported to be an inventory of the securities of his estate, in which these bonds were entered. Some of the entries, if not all, were in his handwriting. The coupons for the semi-annual interest had been cut off by him, and collected for him as they became due subsequent to the purchase, excepting those which were due six months prior to his death; and those coupons had not been detached from the bonds. The proceeds of the coupons which had been collected had been passed to his credit by the bankers who collected them.

It appeared in evidence that the donor had given direction to his bankers to purchase the bonds, and he stated at the time that he wanted them purchased for Carrie (the intended donee); and, after they had been purchased, he directed his banker to have them registered in her name,

and the banker thereupon took them to the office of the company, and the name of the intended donee was indorsed upon each bond, together with the date of such indorsement and the name of the transfer agent. The bonds were then brought back and delivered to the donor, who kept them thereafter as above stated. There is no evidence that the donee knew anything of the transaction, or that she was ever aware of anything concerning the intended gift. Upon these facts we do not see that there was ever any delivery of the bonds. Nothing appears in the case as to what was the effect of the so-called "registry." We are not prepared to hold that the simple indorsement on a bond, payable to bearer, of the name of another party than the true owner, made at his request and at the office of the company issuing the bond, and by an officer thereof, passes the title to the bond to the party whose name is thus indorsed.

An owner of a bond may intend to give it to another, and for that purpose he may obtain such an indorsement, but that does not constitute a delivery of the gift to such person. The owner may subsequently change his mind, and we do not say that he could not effectuate such a change without the aid of an intended donee to whom he had never delivered the gift. The most that the evidence shows is an intention to make a gift of these bonds; but the material fact of a delivery is entirely unproved, and cannot be implied from the evidence.

The case has nothing in common with that of *Martin* v. *Funk*, 75 N. Y. 134, and kindred cases. There was a declaration of trust in those cases, in such form that the donor stated that he was, and he thereby became, a trustee for the donee; and the deposit or gift was made in that character. Nothing of the kind exists here. Neither can it be successfully argued that the delivery of the bonds by the donor to the banker, to have them registered in the name of the donee, was a delivery to the agent of the donee. It was just what it purported to be on its face,—a delivery of the bonds to his own banker, who had purchased them under his own directions,—and the banker continued to act as the agent of the person under whose directions he purchased them when he had the bonds registered, as he was by him directed to do.

Nor does it seem that any aid is furnished the respondent by reference to the Act of 1871, chap. 84. That Act provides for a registry of railroad and other corporate mortgage bonds payable to bearer, for which a registry is not by law provided, which have been or may thereafter be issued and made payable in this State, so as to render such bonds non-negotiable. The Act would seem to refer only to bonds which have been or may be issued and are payable in this State. The bonds in question were issued in the State of Virginia, and payable in Philadelphia or New York, the principal in 1921, and the interest semi-annually. But, even if applicable to these bonds, the registration had no effect upon the coupons; and the possession of the bonds by the original owner gave him complete control over the coupons, and entire power to collect them and otherwise dispose of them.

And again, even if the registry rendered the bonds themselves non-negotiable, we do not see that such fact absolutely changed the legal title to them while the original owner continued to hold them, and failed to carry out his intention to give by a delivery of the bonds to the donee. To render a bond non-negotiable by the mere registry of it in the name of another is not by any means the same in law or in fact as the transfer of the title to the instrument to the party in whose name it may be registered. The title does not pass until a delivery of the bond to the person intended, or to someone for him; although the general negotiability of the bond may have been destroyed by the indorsement.

If an owner of shares of stock in a corporation, intending to give them to A, should take the scrip to the office of the company and surrender it, and receive new scrip in the name of A, has he by this mere change of title on the books of the company, while retaining the entire possession and control of the scrip, and without any delivery thereof to A, accomplished a valid, executed gift of the ownership of the shares to his intended donee? We should say, "Clearly not." In this case the bonds belonged to the donor, as all agree, up to the time of the delivery for registry. After that, even if it be assumed that they were in consequence thereof rendered non-negotiable, how does that change the title? How does it devest the original owner of his right to the bond, and to its possession and control? Could the intended donee maintain an action against the doner to obtain its possession? We think not, and for the very good reason that it would not belong to him. What the particular rights of the original owner, as against the company, might be, and how he should proceed in case he met with a refusal of the company on his demand to erase the registry, are questions not now arising. We are of the opinion, however, that, if it be conceded that the donor intended to give these bonds away, he never accomplished such purpose by any valid delivery thereof, and they remained his property at the time of his death.

We also think that there was no ademption of the legacies to Mrs. Crawford by the gift of the money. We are not able to see how a legacy can be adeemed by a gift made before the execution of the will in which the legacy was given. The small deposit which was made subsequent to the making of the will was but carrying out a purpose entertained long prior thereto; and the legacy contained in the will was not, as we think, adeemed *pro tanto* by the deposit mentioned.

One question is raised as to the admissibility of evidence. Mr. Clark, one of the accounting executors, was called as a witness, and on his cross-examination by counsel for Mrs. Crawford testified to several conversations which he had had with the testator, where the latter stated his intention to make the deposit of money to the credit of his daughter, or stated that he had made a deposit to her credit, and that his intention was to make the fund up to $200,000 in his lifetime, if possible.

It is objected that the evidence thus received was incompetent under section 829 of the Code, and also because it was a declaration of the intestate which did not accompany an act, and was not a part of the *res gestæ*. If it be as-

sumed that the evidence was erroneously received on both grounds, we do not think that any reason exists for reversing the determination of the surrogate as to the moneys deposited. Striking out all the objectionable evidence, and there remains enough uncontradicted and legal evidence to call for the decision of the question of gift, or no gift, in the same way as it now stands.

The same question arising under the evidence of Doctor Boyd may be answered in the same way. The account in the trust company's books, in the absence of anything else, would show the moneys to be the property of Mrs. Crawford. Mr. Rolston, the president of the company, showed that Mr. Townsend deposited moneys or checks drawn by him to the credit of Mrs. Crawford's account. Still, in the absence of any other evidence, the presumption would arise, from such a deposit to the credit of a third party, that the money thus deposited became the property of the person to whose credit it was so deposited. The evidence of Mr. Clark or Doctor Boyd does not alter the presumption, but it is in line with it. Strike it out, and there is evidence sufficient remaining (which is uncontradicted) to demand the decision which the surrogate made. Without, therefore, deciding the question as to the admissibility of the evidence, we think the surrogate's decision regarding the gift was proper in any event.

Lastly, we think the court at general term was right in awarding double commissions. As executors, it was their duty to pay the debts of the deceased; and then all the residue of his property which was not devised or bequeathed to others was, by the third clause of the testator's will, given to the executors in trust for the purposes therein mentioned. They were authorized to sell all the real estate thus devised to them; and they were then directed to divide all the property they received into thirty-two equal parts, and to invest in their names, as trustees of his will, five parts for the benefit of his daughter Mrs. Meagher, and to pay over to her the interest and income thereof during her life, and upon her decease to transfer the same as therein directed. Eight of such thirty-two parts were to be invested in their names as trustees under his will for the benefit of his daughter Mrs. Barlow, and the interest and income thereof were to be paid to her during her life, and upon her death the property was to be transferred as directed in the will; and the remaining nineteen parts were to be similarly invested, and on the same terms, for the benefit of his daughter Mrs. Crawford during her life, with remainder over.

We think that, after the sale of the real estate and the payment of debts, the duty of the executors ended by the payment to the trustees of the thirty-two parts into which the estate directed to be paid over to them was to be divided. From that time the duties of the trustees commenced, and they were to invest in their names as trustees the five, eight, and nineteen parts, respectively, in accordance with the directions of the will. At the death of the testator's daughters, respectively, the trust estate is to be paid by them as trustees and not as executors. This gives them the right to double commissions.

The order of the general term should be modified by charging the executors with the twenty Shenandoah Valley bonds; and as modified, *affirmed, with costs of all parties to be paid out of the estate*

All concur.

UNITED STATES CIRCUIT COURT, NORTHERN DISTRICT OF CALIFORNIA.

Re David NEAGLE, on Habeas Corpus.

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

1. Courts of the United States and their judges, under the provisions of sections 751, 752, and 753 of the Revised Statutes, have jurisdiction upon a writ of habeas corpus, to inquire into the cause of the imprisonment of the petitioner, and if, upon such inquiry, he is found to be "in custody for an act done or omitted in pursuance of a law of the United States," he is entitled to be discharged, no matter from whom or under what authority the process under which he is held may have issued—the Constitution and laws of the United States made in pursuance thereof being the supreme law of the land.

2. In the exercise of this jurisdiction, there is no conflict of authority between the State and the United States, the laws of the United States being the "supreme law of the land," the authority of the State, in such cases, is subordinate, and that of the United States paramount.

3. A state law which contravenes a valid law of the United States is void. In legal contemplation, there can no more be two valid conflicting laws, operating upon the same subject-matter, at the same time, than in physics two bodies can occupy the same space at the same time.

4. The United States is a government, with authority extending over the whole territory of the Union, acting upon the States, and the people of the States. While limited in the number of its powers, it is, so far as its sovereignty extends, supreme. No State can exclude it from exercising those powers, obstruct its authorized officers, against its will, or withhold from it the cognizance of any subject which the Constitution has committed to it.

5. The Constitution and laws of the United States as to those matters wherein they are supreme, extend over every foot of the territories of the United States, and the jurisdiction of its courts to enforce rights derived thereunder is as extensive as the territory to which they are applicable.

6. The National Government has power to command obedience to its laws, to preserve order, and to keep the peace, in matters affecting national interests, and no person or power in the land has a right to resist or question its authority, so long as it keeps within the bounds of its jurisdiction.

7. It is within the power of the government of the United States to protect all the agencies and instrumentalities necessary to accomplish the objects and purpose of that government. It is therefore empowered to protect the lives of the judges of its courts from assault and

assassination on account of their judicial decisions by desperate, disappointed litigants, not only while actually holding court, but while such judges are traveling through their circuits for the purpose of holding courts at the different places therein appointed by law for that purpose.

8. An assault upon or an assassination of a judge of the United States court while engaged in any matter pertaining to his official duties on account or by reason of his judicial decisions or action in performing his official duties, is a breach of the peace, affecting the authority and interests of the United States, and within the jurisdiction and power of the United States Marshal or his deputies to prevent, as a peace officer of the national government.

9. By section 788, Rev. Stat., and the several provisions of the statutes of California prescribing the duties of sheriffs by that section made applicable to marshals, the United States Marshal is made a peace officer, and as such he is authorized to preserve the peace so far as a breach of the peace affects the authority of the United States and obstructs the operations of the government and its various departments. The courts of the United States must be enabled fully to perform all the functions imposed upon them by the Constitution and laws without hindrance or obstruction, and they have the inherent power to protect themselves by and through their executive officers under the direction and supervision of the Attorney-General and the President against obstruction and hindrance in the performance of their judicial duties.

10. Where a deputy United States marshal, acting under instructions from his superior officers—the United States Marshal and the Attorney-General—in protecting the life and person of a justice of the Supreme Court of the United States from a murderous assault made on account of his judicial decisions, at the hands of a dissatisfied litigant, finds it necessary to take the life of the assailant and is arrested by the state authorities and held upon a charge of murder for such act, the United States Circuit Court may, upon habeas corpus, discharge such United States officer from the custody of the state authorities, upon it being shown that the homicide was necessary, or that it was reasonably apparent to the mind of the deputy marshal, at the time and under the circumstances surrounding him, that the killing was necessary in order to protect and defend the justice from great bodily injury, or to save his life.

11. The homicide in such case, if an offense at all, is an offense under the laws of the State, and only the State can deal with it in that aspect. It is not claimed to be a crime punishable under the laws of the United States. But the homicide, when necessarily done by a deputy marshal in the performance of his duty in protecting the life and person of a justice of the United States Supreme Court from assault and violence because of his judicial decisions, is an "act done in pursuance of a law of the United States," and is not and cannot, therefore, be an offense against the laws of the State, no matter what the statute of the State may be—the laws of the United States being the supreme law of the land.

12. It is the exclusive province of the United States courts to ultimately and conclusively determine any question of right, civil or criminal, arising under the laws of the United States. It is therefore the prerogative of the national courts to construe the national statutes and determine upon habeas corpus whether a homicide for which the petitioner is charged with murder by the state authorities was the result of an "act done in pursuance of a law of the United States," and when that question has been determined in the affirmative, the prisoner will be discharged, and the State has nothing more to do with the matter.

13. All the law of the United States is not specifically expressed in statutory enactments. Many powers are necessarily inherent in the various departments of the government, without which the government could not perform functions necessary to its existence. The exercise of such powers, is, nevertheless, in pursuance of the laws of the United States.

14. When statutes confer powers, impose duties, and provide for the accomplishment of various objects, they are, necessarily, couched in general terms, but they carry with them by implication, all the powers, duties and exemptions necessary to accomplish the objects thereby sought to be attained.

15. Acts of the heads of departments of the United States Government in the line of their duties are, in contemplation of law, the acts of the President himself.

16. A party resisting a murderous assault, where several lives are in danger, being in the best position to judge as to the dangers and requirements of the occasion, is the one to determine when the proper moment has arrived, in self-defense, to slay his assailant, in order to be justified by the law; and if he acts in good faith, with reasonable judgment and discretion, the law will justify him, even though he errs. Where several lives are in danger from the assault of a powerful, infuriated, desperate man, common prudence would dictate that the party assailed should fire a second or two too soon, rather than the fraction of a second too late.

(September 16, 1889.)

APPLICATION for the discharge of David Neagle upon a writ of habeas corpus before Sawyer, *Circuit Judge*, and Sabin, *District Judge*, of the United States Circuit Court for the Northern District of California. *Granted.*

It arises out of the following facts:

On the 3d of September, 1888, certain cases were pending in the Circuit Court of the United States for the Northern District of California, between *Frederick W. Sharon, as Executor*, v. *David S. Terry and Sarah Althea Terry, his Wife*, and between Francis G. Newlands, as trustee, and others against the same parties, on demurrers to bills to revive and carry into execution the final decree of the court in the suit of *William Sharon* v. *Sarah Althea Hill*, and were decided on that day. That suit was brought to have an alleged marriage contract between the parties adjudged to be a forgery, and obtain its surrender and cancellation. The decree rendered adjudged the alleged marriage contract to be a forgery, and ordered it to be surrendered and canceled. The decree was rendered after the death of William Sharon, and was therefore entered as of the day when the case was submitted to the court. By reason of the death of Sharon it was necessary, in order to execute the decree, that the suit should be revived. Two bills were filed, one by the executor of the estate of Sharon, and the other a bill of revivor and supplemental, by Newlands as trustee for that purpose.

In deciding the cases, the court gave an elaborate opinion upon the questions involved, and

whilst it was being read certain disorderly proceedings took place for which the defendants, David S. Terry and his wife, were adjudged guilty of contempt and ordered to be imprisoned. The following is an accurate statement of those proceedings, slightly condensed from the opinion of the court, delivered on the subsequent application of David S. Terry to have the order of commitment revoked. For the whole proceeding, see *Re Terry*, 36 Fed. Rep. 419.

Shortly before the court opened, the defendants came into the court-room, and took their seats within the bar at the table next to the clerk's desk, and almost immediately in front of the judges, the defendant, David S. Terry, being at the time armed with a bowie-knife concealed on his person, and the defendant, Sarah Althea, his wife, carrying in her hand a small satchel which contained a revolver of six chambers, five of which were loaded. The court at the time was held by the Justice of the Supreme Court of the United States allotted to this circuit, who was presiding, the United States Circuit Judge of this circuit, and the United States District Judge of the District of Nevada, called to this district to assist in holding the circuit court. Almost immediately after the opening of the court, the presiding justice commenced reading its opinion in the cases mentioned, but had not read more than one fourth of it when the defendant Sarah Althea Terry arose from her seat and asked him, in an excited manner, whether he was going to order her to give up the marriage contract to be canceled.

The presiding justice replied, "Be seated, madam." She repeated the question, and was again told to be seated. She then cried out, in a violent manner, that the justice had been bought, and wanted to know the price he held himself at; that he had got Newlands' money for his decision, and everybody knew it, or words to that effect. It is impossible to give her exact language. The judges and parties present differed as to the precise words used, but all concurred as to their being of an exceedingly vituperative and insulting character.

The presiding justice then directed the marshal to remove her from the court-room. She immediately exclaimed that she would not go from the room, and that no one could take her from it, or words to that effect. The marshal thereupon proceeded towards her to carry out the order for her removal and compel her to leave, when the defendant David S. Terry rose from his seat, evidently under great excitement, exclaiming, among other things, that, "no living man shall touch my wife," or words of that import, and dealt the marshal a violent blow in his face. He then unbuttoned his coat and thrust his hand under his vest, where his bowie-knife was kept, apparently for the purpose of drawing it, when he was seized by persons present, his hands held from drawing his weapon, and he himself forced down on his back. The marshal then removed Mrs. Terry from the court-room. Soon afterward Mr. Terry was allowed to rise, and was accompanied by officers to the door leading to the corridor on which was the marshal's office. As he was about leaving the room, or immediately after stepping out of it, he succeeded in drawing his knife, when his arms were seized by a deputy marshal and others present, to prevent him from using it, and they were able to take it from him only after a violent struggle.

The petitioner Neagle wrenched the knife from his hand, whilst four other persons held on to the arms and body of Terry, one of whom presented a pistol to his head, threatening at the same time to shoot him if he did not give up the knife. To these threats Terry paid no attention, but held on to the knife, actually passing it during the struggle from one hand to another.

Mr. Cross, a prominent attorney, who on that occasion sat next to Mrs. Terry, a little to her left and rear, testifies that just before she arose to interrupt Justice Field, she nervously worked at the clasp of a small satchel about nine inches long, and tried to open it; and not succeeding, in consequence of her excitement, she hastily sprang to her feet and interrupted the Justice as hereinbefore stated. Knowing that she had before drawn a pistol from a similar satchel in the master's room, he concluded at this time that she was trying to get her pistol out, and he consequently held himself in readiness to seize her arm as soon as it should appear, and endeavor to prevent its use until he could get assistance, his right arm being partially disabled. For one occasion in the master's office see *Sharon* v. *Hill*, 11 Sawy. 123.

At this time Mrs. Terry sat directly in front of Justice Field and the Circuit Judge, less than four yards from either. A loaded revolver was afterwards taken from this satchel by the marshal. For their conduct and resistance to the execution of the order of the court, the defendants Sarah Althea Terry and David S. Terry were adjudged guilty of contempt and ordered to be imprisoned, the former for thirty days and the latter for six months.

In consequence of the imprisonment which followed, various threats of personal violence to Justice Field and the Circuit Judge were made by Terry and his wife. Those threats were that they would take the lives of both of those Judges; those against Justice Field were sometimes that they would take his life directly, at other times that they would subject him to great personal indignities and humiliations, and if he resented it they would kill him.

These threats were not made in ambiguous terms, but openly and repeatedly, not to one person, but to many persons, until they became the subject of conversation throughout the State and of notice in the public journals. Reports of these threats through the press and through reports of the United States Marshal and United States Attorney reached Washington, and in consequence of them the Attorney-General thought proper to give instructions to the Marshal of the United States for the Northern District of California to take proper measures to protect the persons of those judges from violence at the hands of Terry and his wife. On the return of Justice Field from Washington to attend his circuit in June last, the probability of an attack by Judge Terry upon him was the subject of conversation throughout the State and of notices in some of the journals in the City of San Francisco. It was the general expectation that if Judge Terry met Justice Field violence would be attempted upon the latter.

In consequence of this general belief and expectation, and the fact that the Attorney-General of the United States had given instructions to the marshal to see that the persons of Justice Field and of the Circuit Judge should be protected from violence, the Marshal of the Northern District appointed the petitioner in this case, David Neagle, to accompany Mr. Justice Field whilst engaged in the performance of his duties and whilst passing from one district to another within his circuit, so as to guard him against the threatened attacks. He was specially commissioned as a deputy by Mr. Franks, whose instructions to him were that he should protect Justice Field at all hazards, and knowing the violent and desperate character of Terry, that he should be active and alert, and be fully prepared for any emergency, but not to be rash; and in case any violence was attempted from anyone, to call upon the assailant to stop, and to inform him that he was an officer of the United States.

Judge Terry was a man of great size and strength, who had the reputation of being always armed with a bowie-knife, in the use of which he was specially skilled, and of showing great readiness to draw and use it upon persons towards whom he entertained any enmity or had any grievance, real or fancied.

On the 8th of August, 1889, Justice Field left San Francisco for Los Angeles in order to hear a habeas corpus case which was returnable before him at that city on the 10th of August, and also to be present at the opening of the court on the 12th. He was accompanied by Deputy Marshal Neagle, the petitioner. Justice Field heard the habeas corpus case on the 10th of August. On the 12th of August he opened the circuit court, Judge Ross sitting with him, and he delivered on the latter day an opinion in an important land case, and also an opinion in the habeas corpus case. On the following day the court heard an application for an injunction in an important water case from San Diego County. No other cases being ready for hearing before the circuit court, he took the train on Tuesday, the 13th, at 1.30 o'clock in the afternoon, for San Francisco, where he was expected to hear a case then awaiting his arrival immediately upon his return, being accompanied on his return by Deputy Marshal Neagle. On the morning of the 14th, between the hours of seven and eight, the train arrived at Lathrop, in San Joaquin County, which is in the Northern District of California, a station at which the train stopped for breakfast. Justice Field and the Deputy Marshal at once entered the dining room there to take their breakfast, and took their seats at the third table in the middle row of tables. Justice Field seated himself at the extreme end, on the side looking toward the door. The Deputy Marshal took the next seat on the left of the Justice. What subsequently occurred is thus stated in the testimony of Justice Field:

"A few minutes afterward Judge Terry and his wife came in. When Mrs. Terry saw me, which she did directly she got diagonally opposite me, she wheeled around suddenly and went out in great haste. I afterwards understood, as you heard here, that she went for her satchel. Judge Terry walked past, opposite to me, and took his seat at the second table below. The only remark I made to Mr. Neagle was, 'There is Judge Terry and his wife.' He remarked, 'I see him.' Not another word was said. I commenced eating my breakfast. I saw Judge Terry take his seat. In a moment or two afterwards I looked round and saw Judge Terry rise from his seat. I supposed at the time he was going out to meet his wife, as she had not returned, so I went on with my breakfast. It seems, however, that he came round back of me—I did not see him—and he struck me a violent blow in the face, followed instantaneously by another blow. Coming so immediately together, the two blows seemed like one assault. I heard 'Stop, stop,' cried by Neagle. Of course I was for a moment dazed by the blows. I turned my head round and I saw that great form of Terry, with his arm raised and his fists clenched to strike me. I felt that a terrific blow was coming, and his arm was descending in a curved way, as though to strike the side of my temple, when I heard Neagle cry out, 'Stop, stop! I am an officer.' Instantly two shots followed. I can only explain the second shot from the fact that he did not fall instantly. I did not get up from my seat, although it is proper for me to say that a friend of mine thinks that I did; but I did not. I looked around and saw Terry on the floor. I looked at him and saw that peculiar movement of the eyes that indicates the presence of death. Of course it was a great shock to me. It is impossible for anyone to see a man in the full vigor of life, with all those faculties that constitute life, instantly extinguished, without being affected; and I was. I looked at him for a moment, then rose from my seat, went around and looked at him again, and passed on. Great excitement followed. A gentleman came to me whom I did not know, but I think it was Mr. Lidgerwood, who has been examined as a witness in this case, and said: 'What is this?' I said: 'I am a Justice of the Supreme Court of the United States. My name is Judge Field. Judge Terry threatened my life, and attacked me, and the deputy marshal has shot him.' The deputy marshal was perfectly cool and collected, and stated: 'I am a deputy marshal and I have shot him to protect the life of Judge Field.' I cannot give you the exact words, but I give them to you as near as I can remember them. A few moments afterwards the deputy marshal said to me: 'Judge, I think you had better go to the car.' I said, 'Very well.' Then this gentleman, Mr. Lidgerwood, said: 'I think you had better.' And with the two I went to the car. I asked Mr. Lidgerwood to go back and get my hat and cane, which he did. The marshal went with me, remained for some time and then left his seat in the car, and as I thought went back to the dining-room. (This is, however, I am told, a mistake, and that he only went to the end of the car.) He returned, and either he or someone else stated that there was great excitement, that Mrs. Terry was calling for some violent proceedings. I must say here that, dreadful as it is to take life, it was only a question of seconds whether my life or Judge Terry's life should be taken. I am firmly convinced that had the marshal delayed two seconds both he and myself would have been the victims of Terry."

In answer to a question whether he had a

pistol or other weapon on the occasion of the homicide, Justice Field replied: "No, sir. I have never had on my person, or used a weapon since I went on the bench of the Supreme Court of the State, on October 13, 1857, except once." That was on an occasion when he crossed the Sierra Nevada Mountains, in 1862. "With that exception, I have not had on my person, or used, a pistol or other deadly weapon."

Mr. Neagle in his testimony stated that before the train arrived at Fresno, he got up and went out on the platform, leaving the train, and there saw Judge Terry and his wife get on the cars; that when the train arrived at Merced he spoke to the conductor, Woodward, and informed him that he was a deputy United States marshal; that Judge Field was on the train, and also Judge Terry and his wife, and that he was apprehensive that when the train arrived at Lathrop there would be trouble between those parties, and inquired whether there was any officer at that station, and was informed in reply that there was a constable there; that he then requested the conductor to send word to the officer to be at Lathrop on the arrival of the train, and that he also applied to other parties to induce them to endeavor to secure assistance for him at that place in case it should be needed. The deputy marshal further stated that when the train arrived at Lathrop, Justice Field went into the dining-room, he accompanying the justice: that they took seats at a table; that shortly after they were seated Judge Terry and his wife entered the dining-room, his wife following him several feet in the rear; that when the wife reached a point nearly opposite Justice Field, she turned around and went out rapidly from the room, and, as appeared from what afterward followed, she went to the car to get her satchel. When she returned from the car the satchel was taken from her, and it was found to contain a pistol—revolver—containing six chambers, all of which were loaded with ball. This pistol lay on the top of the other articles in the satchel. The witness further stated that Judge Terry passed down opposite Justice Field, to a table below where they were sitting; that in a few minutes, whilst Justice Field was eating, Judge Terry rose from his seat, went around behind him—the justice not seeing him at the time—and struck him two blows, one on the side and the other on the back of the head; that the second blow followed the other immediately; that one was given with the right hand and the other with the left; that Judge Terry then drew back his hand, with his fist clenched, apparently to give the justice a violent blow on the side of his head, when he, Neagle, sprang to his feet, calling out to Terry, "Stop, stop! I am an officer;" that Terry bore at the time on his face an expression of intense hate and passion, the most malignant the witness had ever seen in his life, and that he had seen a great many men in his time in such situations, and that the expression meant life or death for one or the other; that as he cried out those words, "Stop, stop! I am an officer," he jumped between Terry and Justice Field, and at that moment Judge Terry appeared to recognize him, and instantly, with a growl, moved his right hand to his left breast, to the position where he usually carried his bowie-knife; that, as his hand got there, the deputy marshal raised his pistol and shot twice in rapid succession, killing him almost instantly. He further stated that the position of Judge Field was such—his legs being at the time under the table, and he sitting—that it would have been impossible for him to have done anything even if he had been armed, and that Judge Terry had a very furious expression, which was characterized by the witness as that of an infuriated giant. He also added, that his cry to him to stop was so loud that it could be heard throughout the whole room, and that he believed that a delay in shooting of two seconds would have been fatal both to himself and Justice Field.

The facts thus stated in the testimony of Justice Field and the petitioner were corroborated by the testimony of all the witnesses to the transaction. The petitioner soon afterwards accompanied Justice Field to the car, and whilst in the car he was arrested by a constable, and at the station below Lathrop was taken by that officer from the car to Stockton, the county seat of San Joaquin County, where he was lodged in the county jail. Mr. Justice Field was obliged to continue on to San Francisco without the protection of any officer. On the evening of that day Mrs. Terry, who did not see the transaction, but was at the time outside of the dining-room, made an affidavit that the killing of Judge Terry was murder, and charged Justice Field and Deputy Marshal Neagle with the commission of the crime. Upon this affidavit, a warrant was issued by a justice of the peace at Stockton against Neagle and also against Justice Field. Subsequently after the arrest of Justice Field, and after his being released by the United States Circuit Court on habeas corpus upon his own recognizance, the proceeding against him before the justice of the peace was dismissed, the governor of the State having written a letter to the Attorney-General of the State, declaring that the proceeding, if persisted in, would be a burning disgrace to the State, and the Attorney-General having advised the District Attorney of San Joaquin County to dismiss it. There was no other testimony whatever before the justice of the peace except the affidavit of Sarah Althea Terry upon which the warrant was issued.

In the suit of William Sharon against Mrs. Terry in the Circuit Court of the United States it was adjudged that the alleged marriage contract between her and Sharon, produced by her, was a forgery, and it was held that she had attempted to support it by perjury and subornation of perjury. She had also made threats during the past year, and up to the time of the shooting of Judge Terry, that she would kill the circuit judge and Justice Field, and she repeated that threat up to the time she made her affidavit for the arrest of Justice Field and Neagle; and that she had made such threats was a notorious fact in Stockton and throughout the State.

The petition was accordingly presented, on behalf of Neagle, to the Circuit Court of the United States for a writ of habeas corpus in this case, alleging, among other things, that he was arrested and confined in prison for an act done by him in the performance of his duty, namely, the protection of Mr. Justice Field,

and taken away from the further protection which he was ordered to give to him. The writ was issued, and upon its return the sheriff of San Joaquin County produced a copy of the warrant issued by the justice of the peace of that county, and of the affidavit of Sarah Althea Terry upon which it was issued. A traverse to that return was then filed in this case, presenting various grounds why the petitioner should not be held, the most important of which were, that an officer of the United States, specially charged with a particular duty, that of protecting one of the justices of the Supreme Court of the United States whilst engaged in the performance of his duty, could not, for an act constituting the very performance of that duty, be taken from the further discharge of his duty and imprisoned by the state authorities, and that when an officer of the United States in the discharge of his duties is charged with an offense consisting in the performance of those duties, and is sought to be arrested, and taken from the further performance of them, he can be brought before the tribunals of the nation of which he is an officer, and the fact then inquired into. The Attorney-General of the State appeared with the District Attorney of San Joaquin County, and contended that the offense of which the petitioner is charged could only be inquired into before the tribunals of the State.

The question of the jurisdiction of the national tribunal to interfere in the matter was elaborately argued by counsel, the Attorney-General of the State and Mr. Langhorne appearing with the District Attorney of San Joaquin County on behalf of the State, and Mr. Carey, United States Attorney, and Messrs. Herrin, Mesick and Wilson appearing on behalf of the petitioner. The latter did not pretend that any person in this State, high or low, who committed a crime, might not be tried by the local authorities if it were a crime against the State, but that when in the performance of his duties that alleged crime consisted in an act which is deemed a part of the performance of a duty devolved upon him by the laws of the United States, it was within the competency of the national tribunals to determine in the first instance whether that act were a duty devolving upon him, and if it was a duty devolving upon him the officer had committed no offense against the State and was entitled to be discharged.

Messrs. **John T. Carey,** *U. S. Atty.*, **Richard S. Mesick, Samuel M. Wilson, Wm. F. Herrin, W. L. Dudley, C. L. Ackerman, J. C. Campbell,** and **H. C. McPike** for the petitioner.

Messrs. **G. A Johnson,** *Atty-Gen.*, of the State of California, **J. P. Langhorne, Avery C. White,** *Dist. Atty.* of San Joaquin County, Cal., for the respondent.

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

The petitioner has sued out a writ of habeas corpus, returnable before the court, alleging that he is unlawfully deprived of his liberty and imprisoned by virtue of a warrant issued by a justice of the peace of San Joaquin County, in this State, charging him with a felonious homicide, whilst the act thus characterized was a lawful act performed in the discharge of his duties as an officer of the United States; and the first question presented is whether this court has jurisdiction to inquire into the truth of that allegation.

Upon the question of jurisdiction, section 751, Rev. Stat. provides that "the supreme court and the circuit and district courts shall have power to issue writs of habeas corpus;" and section 752 further provides that "the several justices and judges of the said courts, within their respective jurisdictions, shall have power to grant writs of habeas corpus for the purpose of an inquiry into the cause of restraint of liberty." There is no limit in these provisions to the jurisdiction of these courts and judges to inquire into the restraint of liberty of any person. But section 753 prescribes some limitations, among which is "that the writ shall not extend to a prisoner in jail, . . . unless he is in custody for an act done or omitted in pursuance of a law of the United States or of an order, process, or decree of a court thereof, or in custody in violation of the Constitution, or of a law or treaty of the United States," and this legislation, in the language of the Chief Justice, in *Ex parte McCardle*, 73 U. S. 6 Wall. 325, 326 [18 L. ed. 817], in commenting upon the same provision in a prior Act "is of the most comprehensive character. It brings within the habeas corpus jurisdiction of every court and of every judge, every possible case of privation of liberty, contrary to the National Constitution, treaties or laws. It is impossible to widen this jurisdiction."

And again, in *Ex parte Royall*, 117 U. S. 249 [29 L. ed. 870], the supreme court says: "As the judicial power of the nation extends to all cases arising under the Constitution, the laws and treaties of the United States; as the privilege of the writ of habeas corpus cannot be suspended unless when in cases of rebellion or invasion the public safety may require it; and as Congress has power to pass all laws necessary and proper to carry into execution the powers vested by the Constitution in the government of the United States, or in any department or officer thereof, no doubt can exist as to the power of Congress thus to enlarge the jurisdiction of the courts of the Union, and of their justices and judges. That the petitioner is held under the authority of a State cannot affect the question of the power or jurisdiction of the circuit court, to inquire into the cause of his commitment, and to discharge him if he be restrained of his liberty in violation of the Constitution. The grand jurors who found the indictment, the court into which it was returned and by whose order he was arrested, and the officer who holds him in custody, are all, equally with citizens, under a duty, from the discharge of which the State could not release them, to respect and obey the supreme law of the land, 'anything in the Constitution and laws of any State to the contrary notwithstanding,' and that equal power does not belong to the courts and judges of the several States; that they cannot, under any authority conferred by the State, discharge from custody persons held by authority of the courts of the United States, or of commissioners of such courts, or by officers of the general government acting under its laws, results from the supremacy of the Con-

stitution and laws of the United States." *Ableman* v. *Booth*, 62 U. S. 21 How. 506 [16 L. ed. 169]; *U. S.* v. *Tarble*, 80 U. S. 13 Wall. 397 [20 L. ed. 597]; *Robb* v. *Connelly*, 111 U. S. 624 [28 L. ed. 542].

We are therefore of opinion that the circuit court has jurisdiction upon writ of habeas corpus to inquire into the cause of appellant's commitment, and to discharge him, if he be held in custody in violation of the Constitution.

In the exercise of this jurisdiction there is no conflict between the authority of the State and of the United States. The State in such cases is subordinate, and the national government paramount. "The Constitution and laws of the United States are the supreme law of the land, and to these every citizen of every State owes obedience, whether in his individual or official capacity." *Ex parte Siebold*, 100 U. S. 392 [25 L. ed. 724]. See also *Tennessee* v. *Davis*, 100 U. S. 257, 258 [25 L. ed. 648].

The exclusive authority of the State to determine whether an offense has been committed against the laws of the State is now earnestly pressed upon our attention.

In *Ex parte Siebold* the court says: "It seems to be often overlooked that a National Constitution has been adopted in this country, establishing a real government therein, operating upon persons and territory and things; and which, moreover, is, or should be, as dear to every American citizen as his state government is. Whenever the true conception of the nature of this government is once conceded, no real difficulty will arise in the just interpretation of its powers. But if we allow ourselves to regard it as a hostile organization, opposed to the proper sovereignty and dignity of the state governments, we shall continue to be vexed with difficulties as to its jurisdiction and authority. No greater jealousy is required to be exercised toward this government in reference to the preservation of our liberties than is proper to be exercised toward the state governments. Its powers are limited in number and clearly defined, and its action within the scope of those powers is restrained by a sufficiently rigid bill of rights for the protection of its citizens from oppression. The true interest of the people of this country requires that both the national and state governments shall be allowed, without jealous interference on either side, to exercise all the powers which respectively belong to them according to a fair and practical construction of the Constitution. State rights and the rights of the United States should be equally respected. Both are essential to the preservation of our liberties and the perpetuity of our institutions. But, in endeavoring to vindicate the one, we should not allow our zeal to nullify or impair the other." 100 U. S. 394 [25 L. ed. 725]. See *Tennessee* v. *Davis*, 100 U. S. 266, 267 [25 L. ed. 651].

This court, then, has jurisdiction to inquire upon this writ into the cause of the imprisonment of the petitioner, and if, upon such inquiry, he is found to be "in custody for an act done or committed in pursuance of a law of the United States," then he is in custody in violation of the Constitution and laws of the United States, and he is entitled to be discharged, no matter from whom or under what authority the process under which he is held may have issued —the Constitution and laws of the United States made in pursuance thereof being the supreme law of the land.

The homicide in question, if an offense at all, is, it must be conceded, an offense under the laws of the State of California, and only the State can deal with it as such or in that aspect. It is not claimed to be an offense under the laws of the United States. But if the killing of Terry by Neagle was an "act done . . . in pursuance of a law of the United States," within the powers of the national government, then it is not, and it cannot be, an offense against the laws of the State of California, no matter what the statute of that State may be, the laws of the United States being the supreme law of the land. A state law which contravenes a valid law of the United States is, in the nature of things, necessarily void—a nullity. It must give place to the "supreme law of the land." In legal contemplation there can no more be two valid laws which are in conflict, operating upon the same subject-matter at the same time, than in physics two bodies can occupy the same space at the same time.

But, as we have seen by the authorities cited, it is the exclusive province of the judiciary of the United States to ultimately and conclusively determine any question of right, civil or criminal, arising under the laws of the United States. It is therefore the prerogative of the national courts to conclusively construe the national statutes and determine whether the homicide in question was the result of an "act done in pursuance of a law of the United States," and when that question has been determined in the affirmative, the petitioner must be discharged, and the State has nothing more to do with the matter. All we claim is the right to determine the question, Was the homicide the result of "an act done in pursuance of a law of the United States?" and if so, discharge the petitioner.

As incidental to and involved in that question, it is necessary to inquire whether the act of the petitioner was performed under such circumstances as to justify it. If it was, then he was in the line of his duty. If not, then it was outside his duty. We do not make the inquiry at all for the purpose of determining whether the act was an offense, or justifiable under the statutes of the State. We do not assume to consider the case in that aspect at all. We simply determine whether it was an act performed in pursuance of a law of the United States. Nor do we act in this matter because we have the slightest doubt as to the impartiality of the State courts, and their ability and disposition to, ultimately, do exact justice to the petitioner. We have not the slightest doubt or apprehension in that particular; but there is a principle involved. The question is, Has the petitioner a right to have his acts adjudged, and, if found to have been performed in the strict line of his authority and duty, a further right to be protected by that sovereignty whose servant he is and whose laws he was executing? If he has that right, then there is no encroachment upon the state jurisdiction, and this court must necessarily entertain his petition and determine his rights under it, and under the laws of the United States. It has no discretion. It cannot decline to hear him with-

out an utter disregard of one of the most important duties imposed upon it by the Constitution and laws of the United States. What the state tribunals might or might not do in this particular instance is not a matter for a moment's consideration. The question is, What are the rights of the petitioner as to having his case heard and disposed of in the courts of the sovereignty whose servant he is and whose laws he was employed in executing? If he has a right to be heard in this court, then we must hear him, willing or unwilling. There is no alternative. Whether the writ should issue, in this case, was not a question of "expediency," and whether the petitioner shall be discharged or remanded is not a question of "policy" or "comity," as suggested in some quarters. It is a question of personal right and personal liberty arising under the Constitution and laws of the United States, which the court cannot ignore. There is a class of cases, of which *Ex parte Royall* is an example, in which the court may exercise a discretion as to the time of interference, but, in our opinion, this is not one of them. *Ex parte Royall*, 117 U. S. 251 [29 L. ed. 871].

But if it rests in our discretion to discharge or remand the petitioner to the state courts, to be there first tried for an offense against the State, while we are satisfied that he is entitled to be discharged, to what useful end would he be sent back, since upon being tried and convicted he would still be discharged by the national courts on habeas corpus, if the act should appear to them to have been performed in pursuance of a law of the United States? This would be but to put the State to great useless expense, and subject the petitioner, if guilty of no offense, to unjust imprisonment in violation of his legal rights, until his trial could be had, and his writ of habeas corpus afterwards again sued out, heard and decided, when the result, in all probability, would at last be the same. Evidently, public justice demands that the case should be "summarily" decided now, as required by section 761, Rev. Stat. The court has no right to trifle with the petitioner's constitutional rights by unnecessarily subjecting him to unjust imprisonment, great expense and vexatious delays. In case of a remand and conviction, the national courts must hear and decide the case at last. Far better for all concerned that they should decide it now, and forever end it. We have no desire to usurp a jurisdiction that does not belong to us. We have enough to do in exercising the admitted jurisdiction conferred upon us, without seeking to enlarge it in the smallest particular, but we must perform our duty as we understand it, be the consequences what they may.

The statutes of the United States also make ample provision for giving full effect to the jurisdiction of this court in cases where the petitioner alleges that he is restrained of his liberty in violation of the Constitution or of a law of the United States, in section 766, which reads as follows, to wit:

"Pending the proceedings or appeal in the cases mentioned in the three preceding sections, and until final judgment therein, and after final judgment or discharge, any proceeding against the person so imprisoned or confined or restrained of his liberty, in any state court, or by or under the authority of any State, for any matter so heard and determined, or in process of being heard and determined, under such writ of habeas corpus, shall be deemed null and void."

It is therefore only necessary, in order to dispose of the case, to inquire and ascertain whether the petitioner is in custody for an act done in pursuance of a law of the United States.

As we have seen from the statement of facts, Mr. Justice Field, of the United States Supreme Court, allotted to the Ninth Circuit, was traveling, officially, from one part of his circuit to another, in pursuance of the requirements of the statutes of the United States, for the purpose of holding a circuit court. By reason of threats against his life made by dissatisfied litigants, generally known and published in the newspapers and brought to the knowledge of the United States Marshal for the Northern District of California, and by him called to the attention of the Attorney-General of the United States, that officer directed the marshal to furnish the justice with protection while thus engaged in the performance of his judicial duties on the circuit. The marshal, deeming it proper, furnished the necessary protection by assigning that duty to the petitioner, who was a United States Deputy Marshal. The claim is that the petitioner, as such deputy marshal, was affording the only protection practicable to Justice Field, in the lawful discharge of his duty, when the homicide was committed, and that the killing was necessary for the preservation of the lives of both Justice Field and himself at the time the fatal shot was fired. The homicide was committed at Lathrop, and not upon land purchased by the United States with the consent of the State for the needful uses of the United States, in pursuance of article 1, section 8, of the Constitution.

Conceding the points to be as stated, do they present a case of an act performed in pursuance of a law of the United States, subject to their jurisdiction and to the jurisdiction of this court, and is the petitioner held under an arrest on a charge of murder by the State "in custody in violation of the Constitution or laws of the United States," within the meaning of the statute?

It is urged that since the homicide was committed in the State at large, and not in the court house or upon land within the exclusive jurisdiction of the United States, the question as to whether the homicide is murder is a question arising exclusively under the laws of the State, and that it can be investigated and determined by the state courts alone. It is admitted on the part of the State that the United States has exclusive jurisdiction over the custom-house block and "over all places purchased by the consent of the Legislature of the State, in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings," in pursuance of section 8, article 1, of the National Constitution, and that the State has no jurisdiction whatever of any offense committed in such places. But it is contended that the United States has no jurisdiction of offenders outside the lands so purchased, in other portions of the State, but that in the State

at large the jurisdiction of the State is exclusive. This proposition, like most others urged by those who insist on extreme state rights doctrines, wholly ignores the principle that there can be no legal conflict or inconsistency in matters wherein the State is subordinate, and the United States paramount—where the Constitution and laws of the United States are the supreme law of the land. We have already seen that although in certain cases the courts of the United States have jurisdiction to discharge on habeas corpus prisoners held in custody by the state courts in violation of the Constitution and laws of the United States, yet that the state courts "cannot under any authority conferred by the State, discharge from custody persons held by authority of the courts of the United States, or of commissioners of such courts, or by officers of the general government acting under such laws," and that this "results from the supremacy of the Constitution and laws of the United States." This principle, established in the Booth and Tarble cases, was recently properly recognized by the Supreme Court of California, when upon the return of the writ of habeas corpus in *Terry's Case*, it appearing that he was in custody by virtue of a judgment of the United States Circuit Court, it declined to require the sheriff to produce his body. As the powers and duties of the state and national courts are by no means reciprocal in this class of cases, so they are not reciprocal in the matter of territorial jurisdiction mentioned, as claimed on the part of the State. The Constitution and laws of the United States, as to those matters wherein they are supreme, extend over every foot of the territories of the United States, and the jurisdiction of its courts to enforce rights derived thereunder is as extensive as the territory to which they are applicable.

In *Ex parte Siebold* the supreme court, in reply to an argument in favor of a wide extension of state rights, uses the following language peculiarly applicable to the point now under consideration: "Somewhat akin to the argument which has been considered is the objection, that the deputy marshals authorized by the Act of Congress to be created and to attend the elections are authorized to keep the peace; and that this is a duty which belongs to the State authorities alone. It is argued that the preservation of peace and good order in society is not within the powers confided to the government of the United States, but belongs exclusively to the States.

"Here, again, we are met with the theory that the government of the United States does not rest upon the soil and territory of the country. We think that this theory is founded on an entire misconception of the nature and powers of that government. We hold it to be an incontrovertible principle, that the government of the United States may, by means of physical force, exercised through its official agents, execute on every foot of American soil the powers and functions that belong to it. This necessarily involves the power to command obedience to its laws, and hence the power to keep the peace to that extent.

"This power to enforce its laws and to execute its functions in all places does not derogate from the power of the State to execute its laws at the same time and in the same places. The one does not exclude the other, except where both cannot be executed at the same time. In that case the words of the Constitution itself show which is to yield. 'This Constitution, and all laws which shall be made in pursuance thereof, shall . . . be the supreme law of the land.'" 100 U. S. 394, 395 [25 L. ed. 725].

And again, "The argument is based on a strained and impracticable view of the nature and powers of the national government. It must execute its powers or it is no government. It must execute them on the land as well as on the sea, on things as well as on persons. And, to do this, it must necessarily have the power to command obedience, to preserve order and keep the peace; and no person or power in this land has the right to resist or question its authority, so long as it keeps within the bounds of its jurisdiction." Id. 396 [726].

The power to keep the peace is a police power, and the United States has the power to keep the peace in matters affecting their sovereignty.

There can be no doubt, then, that the jurisdiction of the United States is not affected by reason of the place—the locality—where the homicide occurred. If the locality is a necessary element of jurisdiction, a majority of the offenses created by the statutes would be out of their jurisdiction, and the statutes creating such offenses would be nullities, and practically useless.

For example, for a quarter of a century the United States Courts in this State were held in rented buildings, owned by private parties. They had no jurisdiction over them under the provision of section 8, article 1, of the National Constitution; and no jurisdiction other than that had over other portions of the country to which the Constitution and its laws extended. Had an assault been committed in open court upon the judge, in one of these buildings, and the assailing party been slain by the marshal in protecting the judge, under circumstances excusing or justifying the homicide, would it be pretended that the court would have no jurisdiction to protect him from interference by the state government? Or have the United States and their courts no jurisdiction over the offense of resisting a United States marshal, in the lawful execution of the process of the courts? or over the crime of counterfeiting the coin or forging the bonds or other securities of the United States, or other offenses against the laws, unless the offense is committed in a place under the exclusive jurisdiction of the United States? Such a claim would be preposterous.

In the case of *Tennessee* v. *Davis* the defendant was indicted for murder in killing one Haynes while he was engaged in discharging his duties as a deputy collector of internal revenue of the United States, and which killing Davis claimed was in self defense. The case was removed to the Circuit Court of the United States under section 643, Rev. Stat. It was contended that this act was an encroachment upon state rights, since it took away the right of the State to determine and execute its own criminal laws; and was therefore unconstitutional. The supreme court sustained the act. It was held "that the United States is a government with authority extending over all the territory of the Union, acting upon the State

and the people of the State." In deciding the case the court said: "As was said in *Martin* v. *Hunter*, 14 U. S. 1 Wheat. 363 [4 L. ed. 97], the 'general government must cease to exist whenever it loses the power of protecting itself in the exercise of its constitutional powers.' It can act only through its officers and agents, and they must act within the States. If, when thus acting, and within the scope of their authority, those officers can be arrested and brought to trial in a state court, for an alleged offense against the laws of the State, yet warranted by the federal authority they possess, and if the general government is powerless to interfere at once for their protection; if their protection must be left to the action of the state court—the operations of the general government may at any time be arrested at the will of one of its members. The legislation of a State may be unfriendly. It may affix penalties to acts done under the immediate direction of the national government, and in obedience to its laws. It may deny the authority conferred by those laws. The state court may administer, not only the laws of the State, but equally federal law, in such a manner as to paralyze the operations of the government. And even if, after trial and final judgment in the state court, a case can be brought into the United States court for review, the officer is withdrawn from the discharge of his duty during the pendency of the prosecution, and the exercise of acknowledged federal power arrested."

"We do not think such an element of weakness is to be found in the Constitution. The United States is a government with authority extending over the whole territory of the Union, acting upon the States and upon the people of the States. While it is limited in the number of its powers, so far as its sovereignty extends it is supreme. No state government can exclude it from the exercise of any authority conferred upon it by the Constitution, obstruct its authorized officers against its will, or withhold from it, for a moment, the cognizance of any subject which that instrument has committed to it." *Tennessee* v. *Davis*, 100 U. S. 262, 263 [25 L. ed. 650].

These expositions of the territorial extent of the jurisdiction of the general government are authoritative and conclusive, and the result is that wherever the Constitution and laws of the United States operate at all, the state laws in conflict with them are subordinate, and those of the United States are supreme and paramount.

Numerous cases are reported in the books, wherein parties arrested for offenses under the state laws, for acts performed in the discharge of duties imposed by the laws of the United States, have been discharged from imprisonment on *habeas corpus* by the United States courts, in consonance with these principles, now authoritatively established by the Supreme Court of the United States, in the cases cited, and others in the same line.

Thus, in *Ex parte Jenkins*, and others, deputy United States marshals, who were arrested on the warrant of a justice of the peace in Pennsylvania, for shooting and wounding a negro, who resisted an arrest attempted under a warrant issued by the United States court for a fugitive slave, *Mr. Justice* Grier of the United States Circuit Court, took jurisdiction and discharged the petitioners, under the Act of 1835, since carried into the Revised Statutes, as part of section 753, under which this case arises. After their discharge, they were arrested again, in a suit by the negro for trespass, upon a warrant issued by a judge of the Supreme Court of Pennsylvania, and again discharged on *habeas corpus* by the United States Circuit Court. After this they were indicted for the shooting and wounding of the negro by the grand jury of Luzerne County, and a third time released on *habeas corpus*. *Ex parte* Jenkins, 2 Wall. Jr. 521 *et seq.*

In the first of these cases *Mr. Justice* Grier observes, "What, then, have we power to do on the return of the writ?"

"The writ of habeas corpus is a high prerogative writ known to the common law; the great object of which is the liberation of those who may be in prison without sufficient cause. It is in the nature of a writ of error, to examine the legality of the commitment. It brings the body of the prisoner up, together with the cause of his commitment. The court can, undoubtedly, inquire into the sufficiency of that cause. . . . Warrants of arrest issued on the application of private informers may show on their face a prima facie charge sufficient to give jurisdiction to the justice; but it may be founded on mistake, ignorance, malice, or perjury. To put a case very similar to the present—A tells B that he has seen C kill D. B runs off to a justice, swears to the murder boldly, without any knowledge of the facts, and takes out a warrant for C, who is arrested and imprisoned in consequence thereof. C prays a habeas corpus, and shows that he was the sheriff of the county, and hanged D in pursuance of a legal warrant. If a court could not discharge a prisoner in such a case because the warrant was regular on its face the writ of habeas corpus is of little use."

"The authority conferred on the judges of the United States by this Act of Congress gives them all the power that any other court could exercise under the writ of habeas corpus, or gives them none at all. If under such a writ they may not discharge their officer, when imprisoned 'by any authority,' for an act done in pursuance of a law of the United States, it would be impossible to discover for what useful purpose the Act was passed. Is the prisoner to be brought before them only that they may acknowledge their utter impotence to protect him?"

In *Ex parte Robinson*, *Mr. Justice* McLean held that "a writ of habeas corpus may issue to relieve an officer of the federal government who has been imprisoned under state authority for the performance of his duty." 6 McLean, 355.

In the course of the decision the learned Justice observes: "It is a general principle of law, to which I know of no exception, that the laws of every government shall be construed by themselves; and such construction is acted upon by 'the judiciary of all other countries.' By the Federal Constitution the judicial power of the United States is declared to be vested in 'one supreme court and such inferior courts as the Congress may from time to time order and

establish.' Under this provision the judiciary of the Union gives a construction to the laws which is obligatory on the state tribunals. The Constitution again declares: 'The Constitution and laws of the United States which shall be made in pursuance thereof, and all treaties made or which shall be made under the authority of the United States, shall be the supreme law of the land and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.'" Id. 362.

Thus it is the exclusive prerogative of the national courts to finally determine whether an act performed by one of the officers of the United States, and especially an officer of the court itself, is done in pursuance of a law of the United States, or whether, when under arrest for acts performed in connection with his office, he is "in custody in violation of the Constitution or of a law of the United States."

In the case of *U. S. ex rel. Roberts* v. *Jailer of Fayette County*, 2 Abb. U. S. 265, a special deputy United States marshal was arrested under the state laws, on a charge of murder, for a homicide committed by him in attempting to arrest one Cull upon a warrant issued by a commissioner of the United States Circuit Court, for offenses charged to have been committed under the internal revenue laws. Upon the hearing, the United States Circuit Court found that the homicide was committed in the performance of "an act done in pursuance of a law of the United States, or of a process of a court or judge of the same," and discharged the petitioner. The question of the jurisdiction of the court and the facts were elaborately discussed.

So in *Ramsey* v. *Jailer of Warren County*, 2 Flipp. 451, the prisoner was a deputy United States marshal, in custody by order of a state court on a charge of murder, the homicide having been committed in an attempt to arrest, upon a warrant issued by the United States courts, the party slain. The court found that the act was done in pursuance of a law of the United States; that petitioner was justified in the act which he performed, and discharged him. See also, to the same effect, *Re Neill*, 8 Blatchf. 167; *Re Farrand*, 1 Abb. U. S. 140; *Electoral College of South Carolina*, 1 Hughes, 571; *Re Hurst*, 2 Flipp. 510, and cases collected in 29 Myers, Fed. Dec. 698.

Thus it appears to be settled beyond controversy that, where a party is in custody by state authority for an act done or omitted to be done in pursuance of any specific provision of a statute of the United States imposing a duty upon him, or for an act performed justifiable by the circumstances of the case, in order to enable him to perform that duty, or in the execution of any order, or process, or decree of a court of the United States or of a judge thereof, the courts of the United States have jurisdiction to discharge him on habeas corpus, under section 753 of the Revised Statutes. In such a case, the laws of the United States are supreme, and the act cannot be an offense against the laws of the State; and, as we have before seen, whether an act is performed in pursuance of a law of the United States is a question exclusively for the United States courts to authoritatively and conclusively determine. They must interpret finally the laws of the United States. With their decision the State cannot interfere. When the United States courts have spoken on the subject, the State has nothing more to do with it.

The only remaining questions to determine are:

1. Was the homicide now in question committed by petitioner while acting in discharge of a duty imposed upon him by the Constitution or laws of the United States, within the meaning of section 753 of the Revised Statutes?

2. Was the homicide necessary, or was it reasonably apparent to the mind of the petitioner at the time and under the circumstances then existing, that the killing was necessary in order to a full and complete discharge of such duty?

It is urged that there is no statute which specifically makes it the duty of a marshal or a deputy marshal to protect the judges of the United States courts while out of the court-room traveling from one point to another in the circuit on official business, from the violence of litigants who have become offended at adverse decisions made by such judges in the performance of their judicial duties, and that marshals or deputies so engaged are not within the provisions of section 753 of the Revised Statutes.

It will be observed that the language of the provision of section 753 is "an act done . . . in pursuance of a law of the United States," not in pursuance of a "statute" of the United States. The statutes passed by Congress by no means constitute all the law of the United States. The principles of the common law, so far as they are applicable and as they have been recognized, and as they are in force under the Constitution, not modified or repealed by the national statutes, and the usages generally, long acted upon, are as much a portion of the laws of the United States as are the statutes themselves. So also where the statutes point out duties, provide for the accomplishment of many objects or confer authority in general terms, they carry with them by implication all the powers, duties, exemptions and authority necessary to carry out and accomplish all the purposes and objects intended to be secured thereby.

Says the supreme court in *Tennessee* v. *Davis*, 100 U. S. 264 [25 L. ed. 651], quoting with approbation from *Chief Justice* Marshall:

"'It is not unusual for a legislative Act to involve consequences which are not expressed. An officer, for example, is ordered to arrest an individual. It is not necessary, nor is it usual, to say that he shall not be punished for obeying this order. His security is implied in the order itself. It is no unusual thing for an Act of Congress to imply, without expressing, this very exemption from state control. . . . The collectors of the revenue, the carriers of the mail, the mint establishment, and all those institutions which are public in their nature are examples in point. *It has never been doubted that all who are employed in them are protected while in the line of their duty; and yet this protection is not expressed in any Act of Congress.* It is incidental to and is implied in the several Acts by which those institutions are created, and is secured to the individuals employed in them by the judicial power alone—that is, the judicial power is the instrument employed

by the government in administering this security.'"

If the officers referred to in the preceding passage are to be protected while in the line of their duty, without any special law or statute requiring such protection, are not the judges of the courts—the principal officers in a department of the government second to no other—also to be protected, and are not their executive subordinates—the marshals and their deputies—to be shielded from harm by the national laws, while honestly engaged in protecting the heads of the courts from assassination?

When it was argued in *Ex parte Siebold* that it was not in the power of the United States to authorize the United States marshals to "keep the peace" at Congressional elections, "that the preservation of peace and good order in society is not within the powers confided to the government of the United States, but belonged exclusively to the State," we have seen the answer of the supreme court to that argument, in cases where the rights and interests of the United States government were involved in the matter of keeping the peace. "We hold it to be an incontrovertible principle," said the court, "that the government of the United States may, by means of physical force, exercised through its official agents, execute on every foot of American soil the powers and functions that belong to it. This necessarily involves the power to command obedience to its laws, and hence the power to keep the peace to that extent."

And again, "Why do we have marshals at all if they cannot physically lay their hands on persons and things in the performance of their proper duties? What functions can they perform, if they cannot use force? In executing the processes of the courts, must they call upon the nearest constable for protection? Must they rely upon him to use the requisite compulsion, and to keep the peace whilst they are soliciting and entreating the parties and bystanders to allow the law to take its course? This is the necessary consequence of the positions that are assumed. If we indulge in such impracticable views as these, and keep on refining and re-refining, we shall drive the national government out of the United States, and relegate it to the District of Columbia, or perhaps some foreign soil. We shall bring it back to a condition of greater helplessness than that of the old Confederation." 100 U. S. 395, 396 [25 L. ed. 726].

In this particular case the petitioner, long before he reached Lathrop, endeavored through the conductor and the proprietor of the eating-house at that place, to have "a constable" in readiness, on the arrival of the train, to keep the peace, but without success. When too late to prevent the tragedy the constable appeared and arrested the petitioner, for performing the duty which it is now claimed devolved exclusively upon himself, or some other peace officer of the State.

Had the United States in this instance relied upon another government—the State of California—to keep the peace as to one of their most venerable and distinguished officers—one of the judges of their highest court—in relation to matters concerning the performance of his official duties, they would have leaned upon a broken reed, and there would now in all probability be a vacancy on the bench of one of the most august judicial tribunals in the world and the deceased—the would-be assassin—might, perhaps, be a tenant of the Stockton jail, to be disposed of by another government. The case affords a striking illustration of the necessity for the United States to protect their own officers while in the discharge of their duties, and by such protection protect the nation itself.

The result was, that instead of arresting the conspirator in the contemplated murder—the wife of the deceased, armed with a loaded revolver till relieved of it by a citizen—threatening death to Justice Field, calling upon the bystanders to aid her, and attempting to enter the car, with the avowed purpose of compassing his death, the officer of the United States assigned by his government to the special duty of protecting the justice's life against these very parties, while in the actual performance of the duties so assigned him, was, himself, arrested, without warrant, and disarmed by an inferior officer of the State, and interrupted in the discharge of those momentous duties, thereby leaving his charge helpless, and without the protection provided by the government he was serving at a time when such protection seemed most needed.

Had Neagle been a deputy sheriff of San Joaquin County assigned by his superior to this very duty of protecting the life of Justice Field, under the state laws, and in the performance of his duties committed the homicide in all other respects under precisely the same circumstances, would he have been arrested by the constable of Lathrop without a warrant, and disarmed with such inconsiderate haste, and thereby prevented from further performing his duty to protect the life and person of Justice Field, leaving him to pursue the remainder of his journey without protection? Yet the constable was informed that Neagle was acting as a deputy United States marshal, under the orders of his superiors, for the protection of the life and person of a justice of the Supreme Court of the United States.

We do not wish to be regarded as now calmly and deliberately looking back upon the scene and sitting in judgment upon the action of the constable or as passing censure upon his zeal. He, doubtless, in the emergency, where time for consideration was short, and the facts not fully appreciated, acted according to the best dictates of his judgment necessarily hastily formed. But when the State now comes in after an arrest upon a warrant issued upon such flimsy testimony as that presented, and deliberately claims the exclusive right to sit in judgment upon the acts of the United States Deputy Marshal, performed not upon his own interpretation of the law, but upon that of the Attorney-General of the United States, who may be presumed to possess some knowledge of his powers and duties, it is well to consider the circumstances from a standpoint presenting a view of both sides of the question.

In matters of the public peace, in which the national government is concerned, the marshals and deputy marshals, within the scope of their authority, are national peace officers, with all the statutory and common-law powers appertaining to peace officers. Is not the national

public peace involved, when a deadly assault is unexpectedly made upon a judge in open court, in which the marshal and his deputies, seeing the assault, are both authorized and bound on their own motion, without any previous order or command, to interpose, and use sufficient force to quell the disturbance, and subdue the parties making it? Yet where is there any specific provision of the statute imposing that duty upon them? The marshal is required to attend court, but it is not provided what he shall do in court. To what end shall he be in court if not to keep order, and, if necessary, to protect the judges from violence, by force, or any practicable means? But there is no statute requiring it in terms.

The general duties of marshals are provided for in section 787, which reads as follows: "It shall be the duty of the marshal of each district to attend the district and circuit courts when sitting therein, and execute throughout the district all lawful precepts directed to him, and issued under the authority of the United States; and he shall have power to command all necessary assistance in the execution of his duty." There is no more authority specifically conferred upon the marshal by this section to protect the judge from assassination, in open court, without a specific order or command, than there is to protect him out of court, when on the way from one court to another, in the discharge of his official duties. And the assassination in court, as well as out of it, might well be accomplished before the judge would be aware of his danger, and before it would be possible to give a command or order to the marshal for his protection. The authority exists in the one case, as in the other, from the nature of the office, and the powers arising under the common law, recognized and in use in the country and, in the nature of things, inherent in the office. The very idea of a government composed of executive, legislative and judicial departments necessarily comprehends the power to do all things through its appropriate officers and agents, with the scope of its general governmental purposes and powers requisite to preserve its existence, protect it and its ministers and give it complete efficiency in all its parts. It necessarily and inherently includes power in its executive department to enforce the laws, keep the national peace with regard to its officers while in the line of their duty, and protect by its all-powerful arm all the other departments and the officers and instrumentalities necessary to their efficiency while engaged in the discharge of their duties.

In language attributed to Mr. Ex-Secretary Bayard, used with reference to this very case, which we quote, not as a controlling judicial authority, but for its intrinsic, sound common sense: "The robust and essential principle must be recognized and proclaimed, that the inherent powers of every government which are sufficient to authorize and enforce the judgment of its courts, are, equally, and at all times, and in all places, sufficient to protect the individual judge who, fearlessly and conscientiously in the discharge of his duty, pronounces those judgments."

Our jurisprudence is derived from and founded upon that of England, and our judges and officers are substantially the same. They have corresponding duties imposed upon them, and inherently possess corresponding executive powers, to enable them to effectively perform their duties. From the foundation of our government, many of their common-law duties have been performed, and common-law powers exercised without specific or statutory direction, and without question, and the common-law principles governing them, except so far as inapplicable, or modified by statute, still remain in force.

The observation of the Supreme Court of California, in *Estate of Apple*, 66 Cal. 434, in which State a Code has been adopted with respect to the common law not abrogated or modified by the Code, is applicable here. Said the court: "The Code establishes the law of this State respecting the subjects to which it relates; but this, of course, does not mean that there is no law with respect to such subjects except that embodied in the Code. When the Code speaks, its provisions are controlling, and they are to be liberally construed, with a view to effect its objects and promote justice—the rule of the common law that statutes in derogation thereof are to be strictly construed having been abolished here; but where the Code is silent, the common law governs."

So here, where the duties of the marshal are not limited, or specifically defined, by the statute, we must look to the powers and duties of sheriffs at common law for them so far as those duties come within the purposes and powers of the national government.

There are many acts and duties daily performed by the marshals and by other officers that are not specifically pointed out or defined by the statute. The marshals are in daily attendance upon the judges, and performing official duties in their chambers. Yet no statute specifically points out those duties or requires their performance Indeed, no such places as chambers for the circuit judges or circuit justices are mentioned at all in the statutes. The judges' chambers do not appear to have any "local habitation." The justices of the Supreme Court at Washington have, in fact, no chambers otherwise than as they study and do their work out of court, at a room in their own residences. We have in the San Francisco court-house rooms that we call chambers, in which the work of the judges out of court is in part, but not wholly, performed. I apprehend that the marshal would as clearly be authorized to protect the judges here in chambers as in the court-room.

All business done out of court by the judge is called chamber business. But it is not necessary to be done in what is usually called chambers. Chamber business may be done, and often is done, on the street, in the judge's own house, at the hotel where he stops, when absent from home, or it may be done *in transitu* on the cars in going from one place to another within the proper jurisdiction to hold court. Mr. Justice Field could, as well, and as authoritatively, issue a temporary injunction, grant a writ of habeas corpus, an order to show cause, or do any other chamber business for the district in the dining-room at Lathrop, or in the cars, as at his chambers in San Francisco, or in the court-room. He could have made a writ of habeas corpus returnable before

himself on the car, and lawfully heard and decided the case while on his passage to San Francisco. The chambers of the judge, where chambers are provided, are not an element of jurisdiction, but are a convenience to the judge, and to suitors—places where the judge at proper times can be readily found, and the business conveniently transacted. But the chambers of the judge, as a legal entity, are something of a myth. For the purposes of jurisdiction, the chambers of the judge are wherever he happens to be in his circuit, or district, when the exigencies of the case call for the transaction of chamber business, and a judge is as clearly engaged in the discharge of the duties of his office when going from one place of holding court to another, for the purpose of holding court, and just as much entitled to protection from his own government against murderous or other assaults, from desperate suitors, on account of his judicial action, as when actually engaged in business at chambers, or in holding court.

In England, whence we derive our jurisprudence, the high sheriff of the shire was the keeper of the King's peace—that is to say, the keeper of the peace of the sovereignty which the King represents. So here, I take it, under the authorities cited, the marshal is the keeper of the peace of the government of the sovereignty he serves, within the scope of the supreme powers of that government. In England, in early days, it was the duty in every shire of the sheriffs not only to attend the courts, but to attend the judges through their circuits. They met the judges at the border of the shire, and attended them until they left it at the border of another. Dalton, Office and Authority of Sheriffs, chap. 98, p. 369, published in 1682. See also 40 Alb. L. J. 161.

Such is also understood to have been the practice in early days in a number of the States. From the advancing state of civilization this practice has, doubtless, generally become unnecessary for the safety of the judges, and it has fallen into desuetude. But it does not follow that the power to thus protect them has been abolished or become extinguished. It simply remains latent or dormant, ready to be called into action whenever the exigencies of the case or times require it. And how could there possibly be a more urgent occasion for reviving the practice and calling it into action, than the recent journey of Justice Field to Los Angeles and return on official business?

Upon general, immutable principles, the power must necessarily be inherent in the executive department of any government worthy the name of government, to protect itself in all matters to which its authority extends, and this necessarily involves the power to protect all the agencies and instrumentalities necessary to accomplish the objects and purposes of that government. In the National Government of the United States the judiciary constitutes one of its most important branches. Unlike the judiciary of other nations it is invested with the jurisdiction to pass, finally and conclusively, upon the powers of the legislative and executive departments of the government, and to confine them within their constitutional limits. It is therefore the balance wheel of the national government, that keeps it running regularly and smoothly within its proper domain. Impotent, indeed, must be the executive branch of the government, if it is not empowered to protect the lives of the judges of the highest branch of its judiciary, from assault and assassination, on account of their judicial decisions, by desperate, disappointed litigants, while passing from point to point within their territorial jurisdiction in the discharge of their high functions and duties. We cannot think the power can be wanting, even if there were no constitutional or statutory provision governing the case. It seems impossible that the national government should be left to the mercy, good will, or complacency of the State, to afford that protection to its judges that the United States, if worthy to be called a nation, are bound themselves to furnish.

As a further example of laws, not ordained by specific statutory enactments, see those respecting punishment for contempts. For forty years after the organization of the national government, down to 1831, there was no statute which specifically defined contempts of court. *Ex parte Robinson*, 86 U. S. 19 Wall. 510 [22 L. ed. 207]; *Ex parte Terry*, 128 U. S. 302, 303 [31 L. ed. 408]; *Ex parte Savin*, 131 U. S. 275 [33 L. ed. 152].

But the courts, nevertheless, exercised the power, necessarily, from the nature of things inherent in every court, to protect itself, its dignity and its officers by the punishment of many acts as contempts of its authority. The first specific Act upon the subject passed by Congress was not an Act enlarging the power of the court, but it was, on the contrary, a restriction of the powers already exercised within certain defined limits. The Act was passed at the instance of Senator Buchanan, to limit the power of the court theretofore exercised, to punish for contempts, as a sequel to the impeachment of a United States Judge for the District of Missouri. The Act was passed March 2, 1831, and is entitled, "An Act Declaratory of the Law Concerning Contempts of Court." 4 U. S. Stat. at L. 487.

The first section does not grant the power to punish for contempts, but expressly recognizes the existing power, and, in express terms thereafter, limits the power to certain enumerated cases. In order that those who were before subject to punishment for contempt should not escape the penalties due their acts, section 2 of the statute makes certain acts, before punishable as contempts, offenses against the laws of the United States, punishable by the less summary and more deliberate proceeding on indictment and trial by a jury. Many of the acts under that Act, recognized as punishable as contempts, as being necessary to the prompt and summary vindication of the authority of the court, are also indictable offenses under other statutes.

This Statute of 1831 has been carried into the Revised Statutes, section 1 of that Act having been re-enacted in section 725 of the Revised Statutes, giving it a granting, as well as a restricting, form, but in no sense changing its purpose or meaning. And section 2 is now found in section 5399 of the Revised Statutes, as a part of the Criminal Code of the nation.

Did anybody ever doubt, or does anybody now doubt, that the power of the United States

courts to punish contempts, from the organization of the government down to 1831, was just as ample, and that it was just as much a part of the law of the United States, inherently vested in the courts, as it was after the passage of the Act of 1831, or as it is now under the same provisions carried into the Revised Statutes?

Yet, there was no specific provision of the statutes defining contempts. It was a power, however, necessarily inherent in the courts. It is involved in the very idea of a court, having power to administer the laws of the land. It would be impossible for courts to perform their functions and administer the laws without it. And as so inherent, the power to punish various acts not mentioned for contempt was as much a part of the law of the United States as if ordained by a specific provision of the statute of the United States, and the authority of the marshal to protect the judges is a cognate power, also, necessarily inherent in the office he holds. Thus there is much law of the United States not now found in terms in the statutes, but as valid and binding upon the people and upon the States as if it were specifically and definitely therein expressed. See *U. S.* v. *Hudson*, 11 U. S. 7 Cranch, 32–34 [3 L. ed. 259]; *Re Meador*, 1 Abb. U. S. 324; *Re Buckley*, 69 Cal. 18.

But we are not without constitutional and statutory provisions, broad enough and specific enough, as we think, to cover the case. The National Constitution, providing a government for sixty-five millions of people, covers but a very few pages, but it seems to be amply sufficient for the purposes intended. In prescribing the duties of the President, in the terse but comprehensive language of section 3, article 2, it provides that "he shall take care that the laws be faithfully executed." This makes him the executive head of the nation, and gives him all the authority necessary to accomplish the purposes intended—all the authority necessarily inherent in the office, not otherwise limited. Congress, in pursuance of powers vested in it, has provided for seven departments, as subordinate to the President, to aid him in performing the executive functions conferred upon him.

Section 346, Rev. Stat. provides that, "one of the executive departments shall be known as the Department of Justice," and that there shall be "an Attorney-General, who shall be the head thereof." He has general supervision of the executive branch of the national judiciary, and section 362 provides as a portion of his powers and duties that "the Attorney-General shall exercise general superintendence and direction over the attorneys and marshals of all the districts of the United States and Territories as to the manner of discharging their respective duties; and the several district attorneys and marshals are required to report to the Attorney-General an account of their official proceedings, and of the state and condition of their respective offices, in such time and manner as the Attorney-General may direct." Section 788, Rev. Stat., provides that "the marshals and their deputies shall have, in each State, the same powers in executing the laws of the United States, as the sheriffs and their deputies in such State may have, by law, in executing the laws thereof."

By section 817 of the Penal Code of this State, the sheriff is a "peace officer." By section 4176, Pol. Code, he is "to preserve the peace," and "prevent and suppress breaches of the peace."

The marshal is therefore, in accordance with the decision of the supreme court already referred to, and under the provisions of the statute above cited, "a peace officer," so far as keeping the peace in any matter wherein the national powers of the United States are concerned, and as to such matters he has all the powers of the sheriff, as a peace officer under the laws of the State. He is, in such matters, "to preserve the peace" and "prevent and suppress breaches of the peace." An assault upon or an assassination of a judge of a United States court while engaged in any matter pertaining to his official duties, on account or by reason of his judicial decisions, or action in performing his official duties, is a breach of the peace, affecting the authority and interests of the United States, and within the jurisdiction and power of the marshal or his deputies to prevent as a peace officer of the national government. Such an assault is not merely an assault upon the person of the judge, as a man. It is an assault upon the national judiciary, which he represents, and through it an assault upon the authority of the nation itself. It is, necessarily, a breach of the national peace. As a national peace officer, under the conditions indicated, it is the duty of the marshal and his deputies to prevent a breach of the national peace by an assault upon the authority of the United States, in the person of a judge of its highest court, while in the discharge of his duty. If this be not so, in the language of the supreme court before cited, "Why do we have marshals at all?" What useful functions can they perform in the economy of the national government?

The Constitution of the United States provides for a supreme court, with jurisdiction more extensive in some particulars than that conferred on any other national judicial tribunal. If the executive department of the government cannot protect one of these judges while in the discharge of his duty, from assassination, by dissatisfied suitors, on account of his judicial action, then it cannot protect any of them, and all the members of the court may be killed, and the court itself exterminated, and the laws of the nation by reason thereof remain unadministered and unexecuted. The power and duty imposed on the President to "take care that the laws are faithfully executed" necessarily carries with it all power and authority necessary to accomplish the object sought to be attained, and, certainly, the power and duty to protect from the deadly assaults of desperate suitors, the lives of the judges of the highest court in the nation, while engaged in the lawful discharge of their duties.

As we have before seen, neither Constitution nor statutes can, or do, anticipate and point out, specifically, every possible right or duty to be covered and secured. They must, necessarily, be general. In the passage already cited from *Tennessee* v. *Davis*, the supreme court, in speaking of certain officers, says: "It has never been doubted that all who are employed in them are protected while in the line of their

duty; and yet this protection is not expressed in any Act of Congress. It is incidental to, and is implied in, the several Acts by which those institutions are created; and is secured to the individuals employed in them by the judicial power alone; that is, the judicial power is the instrument employed by the government in administering this security." 100 U. S. 265 [25 L. ed. 651].

And in *U. S.* v. *Macdaniel*, 32 U. S. 7 Pet. 14 [8 L. ed. 587], similar views were expressed. Said the court: "A practical knowledge of the action of any one of the great departments of the government must convince every person that the head of a department, in the distribution of its duties and responsibilities, is often compelled to exercise his discretion. He is limited in the exercise of his powers by law; but it does not follow that he must show a statutory provision for everything he does. No government could be administered on such principles. . . . There are numberless things which must be done, that can neither be anticipated nor defined, and which are essential to the proper action of the government."

These observations are especially, and forcibly applicable to the terse but very comprehensive provisions of the Constitution and of the several statutes cited, as to the powers and duties of the President, the Attorney-General and marshals.

The act of the Attorney-General in directing the United States Marshal to protect the life of *Mr. Justice* Field against the assaults of the deceased and his wife, is in legal contemplation the act of the President. The President speaks and acts through the heads of the several executive departments in relation to subjects which appertain to their respective duties. They are but the subordinates of the President, wielding his power. *Wilcox* v. *Jackson*, 38 U. S. 13 Pet. 513 [10 L. ed. 264]; *U. S.* v. *Cutter*, 2 Curtis, 617.

In the former case, relating to a reservation of land by the Secretary of War, the court said: "Now although the immediate agent in requiring this reservation was the Secretary of War, yet we feel justified in presuming that it was done by the approbation and direction of the President. The President speaks and acts through the heads of the several departments in relation to subjects which appertain to their respective duties." See also 7 Attorney-General's Opinions, 480, 481, 433–479. *Confiscation Cases*, 87 U. S. 20 Wall. 108, 109 [22 L. ed. 323]; *U. S.* v. *Eliason*, 41 U. S. 16 Pet. 291 [10 L. ed. 968].

By section 788, Rev. Stat. and the several provisions of the statutes of California herein cited, the United States marshal is made a peace officer and as such he is authorized to preserve the peace, so far as a breach of the peace affects the authority of the United States and obstructs the operations of the government and its various departments. The courts must, from the nature of things, be enabled fully to perform all their functions imposed upon them by the Constitution and laws without hindrance or obstruction, and they must have the inherent power to protect themselves by and through their executive officers, under the direction and supervision of the Attorney-General and the President, against obstruction and hindrance in the performance of their judicial duties. An assault upon a judge in court, or a judge out of court, while in the performance of his duty, induced by his judicial action, and intended or calculated to obstruct him in, or deter him from, a free and full discharge of his duty, is a breach of the national peace affecting the sovereignty of the nation, and tending to obstruct and impair the operations and efficiency of one of the most important departments of the government. As such, it is the duty of the United States Marshal, under the police powers of the nation so conferred upon him, by the statutes cited, and as a national peace officer, to prevent such breach of the peace. Under the state laws deputy sheriffs, when occasion requires, constables and police officers of cities, are assigned to certain districts to watch over the safety of the citizens and to guard and protect their persons and property from assault, destruction or injury, in short to prevent the commission of crimes, etc. These officers in cities are found everywhere, night and day, guarding the citizen and his property from injury. So the Attorney-General, under the provisions of the statute cited, and the President under the provisions of the Constitution, requiring him to see that the laws are faithfully executed, are authorized and empowered to direct the assignment by the marshal of any deputy to perform any special national police duty within his jurisdiction, arising out of the statutes, whether by express provision or necessary implication, and under any power, necessarily inherent in the President and government, in order to give full effect and efficiency to the government, or any of its departments. It has never, so far as we are advised, been doubted that a marshal or deputy marshal is authorized to protect a judge, and preserve order in open court, even by the use of force, without any special order or command, as a part of the duties necessarily inherent in his office; yet, as we have already seen, there is no more specific statutory authority for so preserving order, and protecting the judge in court, than for performing the same duty, under proper conditions, for a judge engaged in performing his duties, of whatever nature, out of court.

It is argued by one of the counsel on behalf of the State that these matters pertain exclusively to the peace of the State, and that the State has not only power to preserve the public peace, but that it is amply capable of performing this service, that it is its duty to do it; that the threats of the deceased were matters of public notoriety; and that by calling the powers of the State into action, Justice Field's life might have been protected by the State, and there would have been no necessity whatever for what is called on the part of the State the illegal action of the United States marshal. It may be conceded, and it is undoubtedly true, that it was an imperative duty of the State to preserve the public peace, and to amply protect the life of Mr. Justice Field, but it did not do it. Where would Mr. Justice Field have been to-day, had he relied solely upon the State to perform her conceded imperative duty?

Not having performed that obligation while on his journey in discharge of his judicial duties, does a complaint now come with a good grace from the State against the United States

for performing it for her, as well as for the national government, by protecting one of their most distinguished judicial functionaries through one of their own officers; in the only manner in which it could have been effectively performed?

In the present case, and on this official journey, there was a necessity for the kind of protection afforded Mr. Justice Field, for no other kind would have been adequate. The occasion required a preventive remedy.

The use of the state police force would have been impracticable, as the powers of the sheriff would have ended at the borders of his county, and of other township and city peace officers, at the boundaries of their respective townships and cities. Only a United States marshal, or his deputy, could exercise these official functions throughout the United States judicial district, and, as we have seen, the powers exercised concern matters affecting the peace of the national government, and if the national government has no authority to act in the premises it certainly ought to have such power.

The only remedy suggested on the part of the State was to arrest the deceased and hold him to bail to keep the peace under section 706 of the Penal Code, the highest limit of the amount of bail being $5,000. But although the threats are conceded to have been publicly known in the State, no state officer took any means to provide this flimsy safeguard.

Perhaps counsel intended to intimate that it was not the duty of the State, but of Mr. Justice Field himself, to set in motion proceedings under the law furnished by the State, to put the decedent under bonds to keep the peace. Has it come to this, then, that a Justice of the Supreme Court of the United States, when, in obedience to the behests of the law, he comes to California to perform his judicial duties, must submit to the humiliation of immediately upon his arrival stealing away to some justice of the peace and instituting proceedings to bind over to keep the peace vindictive and dangerous litigants who have threatened his life? But what security to Mr. Justice Field would a bond of $5,000 afford against resolute, violent and desperate parties, for whom the penalties for murder have no deterring power? The United States Marshal, the United States Attorney for the District of California, the Attorney General of the United States at Washington, and the mass of the people of California thought that the exigencies of the occasion required something more, and the result fully justified their view of the matter.

Although no adequate means of protection were afforded by the State on his late official journey, and Mr. Justice Field would, in all probability, not now be among the living had not the petitioner, by the wise forethought of the Attorney-General, been detailed to protect his life, yet the fact of the failure of the State to perform its duty does not afford any reason for taking the petitioner out of the custody of the State, unless, in committing the homicide, he was engaged in the performance of "an act done . . . in pursuance of a law of the United States," and the killing was justifiable. The failure to perform its duty would not alone oust the jurisdiction of the State, if it be exclusive. But since the possible remedy mentioned under the state law was alluded to by counsel as ample, we refer to it as illustrating the necessity for a speedy amendment of the laws of the United States, if they are now so defective as to afford no protection to the United States judges in the performance of their high functions.

It is apparent to us, if he is not now so protected, that the distinquished justice allotted to the Ninth Circuit, and also his associates, should have thrown over them the protecting ægis of the laws of that government which he has so long faithfully and efficiently served.

After mature consideration, we have reached the conclusion that the homicide in question was committed by petitioner while acting in the discharge of a duty imposed upon him by the Constitution and laws of the United States, within the meaning of the provisions of section 753 of the Revised Statutes.

It only remains to inquire, secondly, was the homicide necessary, or was it reasonably apparent to the mind of the petitioner, at the time and under the circumstances then existing, that the killing was necessary in order to a full and complete discharge of such duty?

The answer to this proposition is really included in the answer to the last, but we desire to make some observations bearing especially upon it.

The Attorney-General and counsel for the State declined to discuss the question as to whether the homicide was justifiable, because, in their view, this is a question solely for the state court, the case, as claimed by them, not being within the provisions of section 753 of the Revised Statutes, and, therefore, not within the jurisdiction of this court. Holding, as we do, that the case falls within those provisions, so far as the petitioner was authorized to act, by the Constitution and laws of the United States, it becomes necessary to determine whether the homicide was justifiable. For, if it was malicious, wanton or reckless, without any reasonable apparent necessity in order to fully and properly perform his duty of protecting Justice Field, then it was an act performed beyond and outside his duty, and he is amenable to the state courts.

The facts set forth in the petition, and in the traverse to the return of the sheriff, are fully and satisfactorily proved by the testimony, and whether we determine the case upon demurrer to the traverse, or upon the whole case, as presented in the record and evidence, the result must be the same.

Were the question of justification to be determined by the laws of the State of California, or in the state court, there could be no ground for doubt. Says the Penal Code: "Homicide is also justifiable when committed by any person when resisting any attempt to murder any person, . . . or to do some great bodily injury upon any person." Penal Code, § 197.

But we shall consider the question without reference to the statute of California.

It is unnecessary to repeat the facts in full. When the deceased left his seat, some thirty feet distant, walked stealthily down the passage in the rear of Justice Field and dealt the unsuspecting jurist two preliminary blows, doubtless by way of reminding him that the time for vengeance had at last come, Justice Field was

already at the traditional "wall" of the law. He was sitting quietly at a table, back to the assailant, eating his breakfast, the side opposite being occupied by other passengers, some of whom were women, similarly engaged. When in a dazed condition, he awoke to the reality of the situation and saw the stalwart form of the deceased with arm drawn back for a final mortal blow, there was no time to get under or over the table, had the law under any circumstances required such an act for his justification. Neagle could not seek a "wall" to justify his acts without abandoning his charge to certain death. When, therefore, he sprang to his feet and cried, "Stop! I am an officer," and saw the powerful arm of the deceased drawn back for the final deadly stroke instantly change its direction to his left breast, apparently seeking his favorite weapon, the knife; and at the same time heard the half-suppressed disappointed growl of recognition of the man who, with the aid of half a dozen others, had finally succeeded in disarming him of his knife at the court-room a year before,—the supreme moment had come, or, at least, with abundant reason he thought so, and fired the fatal shot. The testimony all concurs in showing this to be the state of facts, and the almost universal consensus of public opinion of the United States seems to justify the act. On that occasion, a second, or two seconds, signified, at least, two valuable lives, and a reasonable degree of prudence would justify a shot one or two seconds too soon, rather than a fraction of a second too late. Upon our minds the evidence leaves no doubt whatever that the homicide was fully justified by the circumstances.

We have seen in an eastern law journal, but with its disapproval, some adverse criticism upon the action of the petitioner, attributed to a quarter ordinarily entitled to great consideration and respect. But it is not for scholarly gentlemen of humane and peaceful instincts—gentlemen, who, in all probability, never in their lives saw a desperate man of stalwart frame and great strength in murderous action—it is not for them sitting securely in their libraries, 3,000 miles away, looking backward over the scene, to determine the exact point of time when a man in Neagle's situation should fire at his assailant, in order to be justified by the law. It is not for them to say that the proper time had not yet come. To such, in all probability, the proper time would never come. Neagle on the scene of action, facing the party making a murderous assault, knowing by personal experience his physical powers, and his desperate character; and by general reputation, his life-long habit of carrying arms, his readiness to use them, and his angry, murderous threats, and seeing his demoniac looks, his stealthy assault upon Justice Field from behind, and remembering the sacred trust committed to his charge—Neagle, in these trying circumstances, was the party to determine when the supreme moment for action had come, and if he, honestly, acted with reasonable judgment and discretion, the law justifies him, even if he erred. But who will have the courage to stand up in the presence of the facts developed by the testimony in this case, and say that he fired the smallest fraction of a second too soon?

In our judgment he acted, under the trying circumstances surrounding him, in good faith and with consummate courage, judgment and discretion. The homicide was, in our opinion, clearly justifiable in law, and in the forum of sound, practical common sense, commendable. This being so, and the act having been "done . . . in pursuance of a law of the United States," as we have already seen, it cannot be an offense against, and he is not amenable to the laws of the State.

Let the petitioner be discharged.

INDIANA SUPREME COURT.

Jesse MILNER *et al.*, *Appts.*,
v.
Clara J. BOWMAN *et al.*

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

1. The holder of a certificate of membership or other evidences of interest, in a benevolent or charitable association, may under the state statutes change the beneficiary named in such certificate with the consent of the association.

2. Where a person procures insurance on his own life, and pays the premiums, he may assign the certificate to one having no interest in the life of the assured.

3. Where he was solvent at the time of making the assignment, his insolvency at the time of his death will not affect the validity of the assignment.

(June 29, 1889.)

APPEAL by defendants from a judgment of the Superior Court of Marion County in

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NOTE.—*General doctrine that beneficiary may be changed.*

The weight of authority is in favor of the general doctrine that beneficiaries may be changed in cases where policies are issued by such associations, and that in this respect such policies are not governed by the general rule which governs ordinary insurance contracts, unless the charter of the association prohibits a change in the beneficiary first agreed upon and designated. It is firmly settled that a contract must be made in the mode prescribed by the corporate charter, and must be one authorized by it. Ohio Ins. Co. v. Nunnemacher, 15 Ind. 294; Leonard v. Am. Ins. Co. 97 Ind. 299; Ashbury R. Carriage & Iron Co. v. Riche, L. R. 7 H. L. 653; Head v. Providence Ins. Co. 6 U. S. 2 Cranch, 127 (2 L. ed. 229); Rev. Stat. 1881, 3850; Presby. Assur. Fund v. Allen, 4 West. Rep. 712, 106 Ind. 533 and cases cited; Gentry v. Supreme Lodge, K. of H. 20 Cent. L. J. 393; Hellenberg v. District No. 1, I. O. B. B. 94 N. Y. 580; Duvall v. Goodson, 79 Ky. 224; Eastman v. Provident Mut. R. Asso. 20 Cent. L. J. 206; Masonic Mut. Ben. Society v. Burkhart, 7 West. Rep. 528, 110 Ind. 189.

The Supreme Court of Minnesota held that the beneficiary under a membership in a benefit society could be changed at the pleasure of the member because the contract permitted it, the reservation

See also 9 L. R. A. 841; 11 L. R. A. 205; 15 L. R. A. 114; 21 L. R. A. 746.

favor of plaintiffs in an action brought by the assignee of a certificate of membership in a mutual benefit association. *Reversed.*

The facts are sufficiently stated in the opinion.

Mr. **Thomas Hanna,** for appellants:

The court below erred in sustaining the demurrer of Rufus F. Larkin, administrator of the estate of Sylvanus Milner, deceased, to the first and second paragraphs of appellants' amended and verified cross-complaint. It is well settled by law-writers and courts of final judicature that the term "heirs at law," or "heirs" of "A," either is a good designation of a person or persons.

1 Bouvier, L. Dict. p. 583, defines "heirs at law" viz.: "He, who after his ancestor's death intestate has a right to all the lands, tenements, and hereditaments which belong to him, or of which he was seised the same as heir general."

1 Bouvier L. Dict. pp. 582, 583; 2 Bouvier, L. Dict. p. 22.

When no property in the bequest is given to "A," and the money is bequeathed to his heirs, or to him with limitations to his heirs, if he died before the testator, and if there be nothing in the will showing the sense in which the testator made of the word "heirs," the next of kin of "A" are entitled to claim under the description as the only persons appointed by law to succeed to personal estate. *Holloway* v. *Holloway*, 5 Ves. Jr. 403; *Lowndes* v. *Stone*, 4 Ves. Jr. 649; *Horseman* v. *Abbey*, 1 Jac. & W. 388.

A bequest to the heirs of an individual, without addition or explanation, will belong to the next of kin. *Chamberlain* v. *Jacob*, Ambl. 72; *Target* v. *Gaunt*, 1 P. Wms. 432; *Donne* v. *Merrefield*, cited in *Sabbarton* v. *Sabbarton*, Cas. t. Talb. 56; *Hodgeson* v. *Bussey*, 2 Atk. 89; *Hockley* v. *Mawbey*, 1 Ves. Jr. 145; *Crawford* v. *Trotter*, 4 Madd. 361; *Gwynne* v. *Muddock*, 14 Ves. Jr. 488; May, Life Ins. 2d ed. p. 584; *Shaw* v. *Loud*, 12 Mass. 447; 2 Washb. Real Prop. 274; *Loos* v. *John Hancock Mut. L. Ins. Co.* 41 Mo. 533.

The deed to W. S. or to his heirs, if W. S. be dead when the deed is made, then his heirs take.

Ready v. *Kearsley*, 14 Mich. 224; *Hogan* v. *Page*, 69 U. S. 2 Wall. 607 (17 L. ed. 854).

Rusing v. *Rusing*, 25 Ind. 63, defines the term "heirs or heirs at law" as the persons next of kin. *Sicelоff* v. *Redman*, 26 Ind. 231, and cases there cited.

Presby. Mut. Assur. Fund v. *Allen*, 4 West. Rep. 712, 106 Ind. 593; *Wilburn* v. *Wilburn*, 83 Ind. 55; *Pence* v. *Makepeace*, 65 Ind. 345; *Hutson* v. *Merrifield*, 51 Ind. 24; *McClure* v. *Johnson*, 56 Iowa, 620.

"To the heirs and legal representatives" means next of kin.

Catholic Mut. Ben. Asso. v. *Priest*, 46 Mich. 429; *Kentucky Masonic Mut. L. Ins. Co.* v. *Miller*, 13 Bush, 489; *Masonic Mut. Relief Asso.* v. *McAuley*, 2 Mackey, 70; *Loos* v. *John Hancock Mut. L. Ins. Co.* 41 Mo. 538.

It is not within the power or purview of the Masonic Mutual Benefit Society to contract that an administrator or executor shall be designated as a beneficiary—any contract of that kind would be *ultra vires.*

Ballou v. *Gile*, 50 Wis. 614; *Worley* v. *Northwestern M. Aid Asso.* 3 McCrary, 53, 10 Fed. Rep. 227; *Maryland Mut. Benev. Society* v. *Clendinen*, 44 Md. 429, 22 Am. Rep. 52; *Arthur* v. *Odd Fellows Ben. Asso.* 29 Ohio St. 557; *Addison* v. *New England Com. Trav. Asso.* 4 New Eng. Rep. 639, 144 Mass. 591.

The phrase "legal representatives," means next of kin and not administrator or executor.

Ind. Rev. Stat. 1881, § 284; *Stewart* v. *Terre Haute & I. R. Co.* 1 West. Rep. 152, 103 Ind. 44; *Indianapolis P. & C. R. Co.* v. *Keely*, 23 Ind. 133.

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of such power being made in the laws of the society. Richmond v. Johnson, 28 Minn. 449; Bacon, Benev. Societies, 471.

Designating a beneficiary, whether executing a power, or disposing of ordinary property, is ambulatory and liable to be revoked. *Re* Davies' Trusts, L. R. 13 Eq. 163; Oke v. Heath, 1 Ves. Sr. 135; Easum v. Appleford, 5 Myl. & Cr. 56; Duke of Marlborough v. Lord Godolphin, 2 Ves. Sr. 78; Masonic Mut. Relief Asso. v. McAuley, 2 Mackey, 70; Masonic Mut. Ben. Society v. Burkhart, *supra.*

Mode of change.

The mode agreed upon in the contract, whereby the name of the beneficiary should be changed, was made a matter of substance, and should be complied with. National Mut. Aid Society v. Lupold, 101 Pa. 111; Gentry v. Supreme Lodge, K. of H. 23 Fed. Rep. 718, 20 Cent. L. J. 393; Ireland v. Ireland, 42 Hun, 212; Supreme Lodge, K. of H. v. Nairn, 60 Mich. 44; Vollman's App. 92 Pa. 50; Elliott v. Whedbee, 94 N. C. 115; Highland v. Highland, 109 Ill. 366; Greeno v. Greeno, 23 Hun, 478; Kentucky Masonic Mut. L. Ins. Co. v. Miller, 13 Bush, 489; Manning v. Supreme Lodge, A. O. U. W. 86 Ky. 136; Renk v. Herrman Lodge, 2 Dem. 409; Olmstead v. Masonic Mut. Ben. Society, 37 Kan. 93; Basye v. Adams, 81 Ky. 368; Daniels v. Pratt, 3 New Eng. Rep. 480, 143 Mass. 216; Harman v. Lewis, 24 Fed. Rep. 97, 530; Eastman v. Provident Mut. R. Asso. (N. H.) 20 Cent. L. J. 266; Hotel Men's Mut. Ben. Asso. v. Brown, 33 Fed. Rep. 11.

Rights of members determined by laws of the association.

During his lifetime the member may exercise the power of appointment, without other limits or restrictions except such as are imposed by the organic law, or by rules and regulations of the society duly adopted in compliance therewith. Splawn v. Chew, 60 Tex. 532; Expressmen's Aid Society v. Lewis, 9 Mo. App. 412; Ballou v. Gile, 50 Wis. 614; Dietrich v. Madison Relief Asso. 45 Wis. 84; Richmond v. Johnson, 28 Minn. 447; Eastman v. Provident Mut. R. Asso. 20 Cent. L. J. 266; Gentry v. Supreme Lodge, K. of H. Id. 383; Masonic Mut. Ben. Society v. Burkhart, 7 West. Rep. 528, 110 Ind. 189.

The laws and regulations determine the rights of the members and the association, and may be enforced by the parties and beneficiaries, according to their respective rights as therein provided. Arthur v. Odd Fellows Ben. Asso. 29 Ohio St. 557, 560; May, Ins. § 552; Bliss, L. Ins. § 426; Osceola Tribe Red Men v. Schmidt, 37 Md. 196; Union Mut. Asso. v. Montgomery (Mich) 14 West. Rep. 880.

Change in the disposition of money to be received on the death of a member of a lodge must be made in the form prescribed by the by-laws of the lodge. Ireland v. Ireland, 42 Hun, 212.

The mention of one method of change has been held to impliedly or expressly exclude all others on the ground that, "*expressio unius est exclusio alterius.*" Coleman v. Knights of Honor, 18 Mo. App. 189; Olmstead v. Masonic Mut. Ben. Society, 37 Kan. 93; Bacon, Benev. Societies, 476.

The doctrine is laid down in Willard on Executors, 376, "that a bequest to legal representatives points to such persons as are embraced in the Statutes of Distribution; but a bequest to personal representatives has been held to include the executor."

Jennings v. *Gallimore*, 3 Ves. Jr. 146; *Evans* v. *Charles*, 1 Anstr. 128.

Willard on Executors, 398, defines the legal representatives as given by the New York Statutes of Distribution to be his heirs or next of kin.

Loos v. *John Hancock Mut. L. Ins. Co.* 41 Mo. 538; May, Life Ins. *supra*; 2 Bouvier, L. Dict. pp. 22, 23.

Messrs. **D. M. Bradbury** and **Elmer Marshall** for appellees.

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

Sylvanus Milner, an unmarried man, was a master Mason, and on the 16th day of November, 1872, he became a member of the Masonic Mutual Benefit Society of Indiana, a corporation organized for charitable purposes. The object of the corporation, as stated in its articles of incorporation, is "to give financial aid and benefit to the widows and orphans and dependents of deceased members." The association issued to the said Sylvanus a certificate of membership under its corporate seal, and signed by its officers. The certificate is payable "to the heirs of the said Sylvanus Milner, or to the legal representatives of the said Sylvanus Milner." At the date of the issuing of the certificate the mother and brother of Sylvanus were living, and were, at that time, his only heirs at law. At that date his mother lived with him, and continued to live with him until her death, in 1876, and was dependent upon him for her maintenance, and he supported her during all of that time. The brother died intestate, a resident of Indiana, in 1876, without issue or descendant, leaving no widow, and leaving as his only heirs at law his mother and brother, Sylvanus, the assured. His estate has been fully settled, and all of his debts have been paid. Afterwards, in the same year, his mother died intestate, a resident of Indiana, leaving no husband and no children or descendant except Sylvanus, the person whose life was insured by this certificate, her only heir at law. Her estate has been fully settled, and all her debts have been paid.

In 1877, after the death of his mother, Sylvanus Milner, by indorsement thereon, signed by him, directed the association to pay the proceeds of said certificate to the plaintiff Clara J. Bowman. Milner paid all dues and assessments up to his death, keeping in force the membership and insurance. He died in 1885.

The plaintiff Clara J. Bowman brought this suit against the association, counting in her complaint on the certificate of insurance and assignment, and order indorsed thereon by Milner, transferring it to the plaintiff. The association answered, admitting its liability in the sum of $2,500, interpleading Rufus F. Larkin, the administrator of Milner, and Jesse Milner *et al.*, the heirs at law of Sylvanus Milner, and paying the money into court. The amount was conceded to be correct, and the association was discharged by a proper decree of the circuit court. The persons interpleaded all appeared, and the controversy proceeded between the plaintiff Bowman, the heirs of Milner, and his administrator. Trial was had, resulting in a judgment and decree in favor of the admin-

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A by-law which is inconsistent with the charter of the corporation is utterly void. Presby. Assur. Fund v. Allen, 4 West. Rep. 712, 106 Ind. 593.

It will be presumed that the change was made in the manner provided by law, and by the rules and regulations of the society made in conformity therewith. *Ibid.*; Hicks v. Perry, 1 New Eng. Rep. 715, 140 Mass. 580; Masonic Mut. Ben. Society v. Burkhart, 7 West. Rep. 529, 110 Ind. 189.

Right to change, reserved in contract.

The person procuring the policy for the benefit of another may reserve the right to change this designation, in whole or in part, and the law will respect any change he may make in the beneficiaries named in the policy in pursuance of such rights. Bliss, Life Ins. 318; Hutchings v. Miner, 46 N. Y. 456. See Ricker v. Charter Oak L. Ins. Co. 27 Minn. 193; Swift v. Railway Pass. & F. C. Mut. Aid & Ben. Asso. 96 Ill. 309; Richmond v. Johnson, 28 Minn. 447; Greeno v. Greeno, 23 Hun, 473; Barton v. Provident Mut. Relief Asso. 1 New Eng. Rep. 856, 63 N. H. 535.

The assured had a right to change the beneficiary, provided he made the change in the manner provided in the contract. Holland v. Taylor, 9 West. Rep. 606, 111 Ind. 127; Stephenson v. Stephenson, 64 Iowa, 534; Bacon, Benev. Societies, 475.

The right to change the beneficiary is not affected by the fact that the first beneficiary paid the assessments of the member and the change was made without his consent. Fisk v. Equitable Aid Union (Pa.) 9 Cent. Rep. 403.

That right cannot be defeated by the separate, or the combined, acts of the assured and the insurance company without the consent of the beneficiary. Harley v. Heist, 86 Ind. 196, 44 Am. Rep. 285; Damron v. Penn. Mut. L. Ins. Co. 99 Ind. 478.

After the death of the beneficiary designated, a member has the right to nominate his wife as the party entitled to the insurance money. Van Bibber v. Van Bibber, 82 Ky. 347.

Policy taken out on member's own life.

A husband who takes out a policy of insurance on his own life in his own name is entitled to treat it as his own property and dispose of it by will. Rison v. Wilkerson, 3 Sneed, 565; Williams v. Corson, 2 Tenn. Ch. 269, affirmed on appeal. Bacon, Benev. Societies, 470.

The same rule would undoubtedly apply where he voluntarily assigned to his wife, by an executed contract, a policy taken out payable to himself. Fortescue v. Barnett, 3 Myl. & K. 36.

A benefit certificate would be governed by the same rule, and would remain the property of the husband, subject to disposition by will unless previously assigned for a valuable consideration, or voluntarily transferred by an executed contract. Weil v. Trafford, 3 Tenn. Ch. 108; Swift v. Railway Pass. & F. C. Mut. Aid & Ben. Asso. 96 Ill. 309.

If he take the policy in the name of his wife, intending to give her the benefit of it, she would thereby acquire a vested interest of which he could not afterwards deprive her. Gosling v. Caldwell, 1 Lea, 454.

Change of beneficiary on reinstatement of member.

Where a member of a benefit society becomes suspended for nonpayment of assessments, he may, in his application for reinstatement, designate a new

See also 9 L. R. A. 534.

istrator for the whole of the fund,—the proceeds of the certificate. The heirs of Sylvanus Milner appealed, and by agreement between all the parties the cause is to be treated as if Clara J. Bowman had also appealed and filed duplicate transcript; and no question is to be raised as to any informality in the manner of the appeal.

The question presented on this appeal is, Which of the three claimants, as among themselves, has the better right to the proceeds of the certificate of insurance? The plaintiff's complaint is in three paragraphs. Larkin, administrator, files answer and cross-complaint against plaintiff and Milner's heirs. Jesse Milner *et al.* file demurrer to each paragraph of the complaint, which is sustained, and exceptions. Jesse Milner *et al.*, heirs of Sylvanus Milner, demur to the answer and cross-complaint of Larkin, administrator, and it is overruled, and exceptions. Jesse Milner *et al.*, heirs of Sylvanus Milner, file verified cross-complaint against the plaintiff Bowman, and Larkin, administrator, in two paragraphs. Larkin, administrator, files demurrer to each paragraph of complaint, which is sustained, and exceptions. Larkin, administrator, demurs to each paragraph of the cross-complaint of Jesse Milner *et al.*, and it is sustained, and exceptions. Jesse Milner *et al.* file answer in three paragraphs to Larkin's cross-complaint, and Larkin demurs to the second and third paragraphs of the answer of Jesse Milner *et al.*, which is sustained, and exceptions. Plaintiff Bowman demurs to each paragraph of the cross-complaint of Jesse Milner *et al.*, and it is sustained, and exceptions. Plaintiff demurs to the cross-complaint of Larkin, administrator, which is overruled and exceptions. Plaintiff Bowman files answer in general denial to Larkin's cross-complaint. Plaintiff Bowman refuses to amend and elects to stand by her complaint, and Jesse Milner *et al.*, heirs of Sylvanus Milner, also refuse to amend their cross-complaint. The various rulings of the court, as stated, are each assigned as error. We do not deem it necessary to set out a synopsis of the pleadings in the case, as they are in the usual form, and no question is presented as to the particular allegations of them. As the association has waived all questions as to its liability, and paid the money into court, it is unnecessary to determine any question as to its liability on the policy or the validity of the assignment as to the association.

Rev. Stat. 1881, § 3850, provides that "all certificates of membership, policies, or other evidences of interest, in any Masonic, Odd Fellows, or other benevolent or charitable association, society, or incorporation named in section 1 of this Act (section 3848) shall be regarded as a contract between the person whose life is insured by such certificate of membership, policy, or other evidence of interest, and the association, society, or incorporation of which he is a

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beneficiary, and the society in readmitting him acquiesces in the change. Davidson v. Supreme Lodge, K. of P. 4 West. Rep. 322, 22 Mo. App. 263.

Provision for change by the laws of the order.

The beneficiary may be changed if the laws of the order so provide, or if, when such transfer is not prohibited by the laws of the society, the certificate of policy has not been delivered to the beneficiary. Holland v. Taylor, 9 West. Rep. 606, 111 Ind. 121; Ireland v. Ireland, 42 Hun, 212; Supreme Lodge v. Martin, 13 W. N. C. 160; Splawn v. Chew, 60 Tex. 532; Highland v. Highland, 109 Ill. 566; Coleman v. Knights of Honor, 18 Mo. App. 189; Raub v. Masonic Mut. Relief Asso. 3 Mackey, 68; Lamont v. Hotel Men's Mut. Ben. Asso. 30 Fed. Rep. 817; Barton v. Provident Mut. Relief Asso. 1 New Eng. Rep. 856, 63 N. H. 535; Schillinger v. Boes, 85 Ky. 357; Masonic Mut. Ben. Society v. Burkhart, 7 West. Rep. 527, 110 Ind. 189; Supreme Council, Cath. Mut. Ben. Asso. v. Priest, 46 Mich. 429; Gentry v. Supreme Lodge, K. of H. 23 Fed. Rep. 718, 20 Cent. L. J. 393; Supreme Council Am. Legion of Honor v. Perry, 1 New Eng. Rep. 715, 140 Mass. 580; Durian v. Central Verein of Hermann's Soehnne, 7 Daly, 168; Lemon v. Phœnix Mut. L. Ins. Co. 38 Conn. 301; Deady v. Bank Clerks' Mut. Ben. Asso. 17 Jones & S. 246; Johnson v. Van Epps, 14 Ill. App. 201, 110 Ill. 551; Tennessee Lodge v. Ladd, 5 Lea, 716; Bacon, Benev. Societies, 472.

Difference between policies of insurance and certificates of benefit societies.

The designation of the beneficiaries in the ordinary policy of insurance issued by an ordinary insurance company fixes their rights. Hutson v. Merrifield, 51 Ind. 24; Pence v. Makepeace, 65 Ind. 345; Godfrey v. Wilson, 70 Ind. 50; Wilburn v. Wilburn, 83 Ind. 55; Harley v. Heist, 86 Ind. 196; Damron v. Penn Mut. L. Ins. Co. 99 Ind. 478; Penn Mut. L. Ins. Co. v. Wiler, 100 Ind. 92; Chapin v. Fellowes, 36 Conn. 132, 4 Am. Rep. 49; Glanz v. Gloeckler, 104 Ill. 573; Manhattan L. Ins. Co. v. Smith, 3 West. Rep. 116, 44 Ohio St. 156; Bliss, Life Ins. 2d ed. 540; Presby. Assur. Fund v. Allen, 4 West. Rep. 712, 106 Ind. 593.

Whatever rights beneficiaries have in life policies, they have by virtue of the contract between the insurance company and the assured. Holland v. Taylor, 9 West. Rep. 606, 111 Ind. 125; Bacon, Benev. Societies, 466.

There is much diversity of opinion upon the question as to the applicability of this principle to policies issued by associations of the class to which appellant belongs. McClure v. Johnson, 56 Iowa, 620; Tennessee Lodge v. Ladd, 5 Lea, 716; Durian v. Central Verein of Hermann's Soehnne, 7 Daly, 168; Richmond v. Johnson, 28 Minn. 447; Swift v. Railway Pass. & F. C. Mut. Aid & Ben. Asso. 96 Ill. 309; Ballou v. Gile, 50 Wis. 614; Masonic Mut. Relief Asso. v. McAuley, 2 Mackey (D. C.) 70; Kentucky Masonic Mut. L. Ins. Co. v. Miller, 13 Bush, 489; Supreme Council, Cath. Mut. Ben. Asso. v. Priest, 46 Mich. 429; Expressmen's Aid Society v. Lewis, 9 Mo. App. 412; Maryland Mut. Benev. Society v. Clendinen, 44 Md. 429, 22 Am. Rep. 52; Presby. Assur. Fund v. Allen, 4 West. Rep. 714, 106 Ind. 593.

The essential difference between a certificate of membership in a beneficiary association and an ordinary life policy is that in the latter the rights of the beneficiary are fixed by the terms of the policy, while in the former they depend upon the certificate and the rights of the member under the constitution and by-laws of the society. Durian v. Central Verein of Hermann's Soehnne, 7 Daly, 168; Tennessee Lodge v. Ladd, 5 Lea, 716; Swift v. Railway Pass. & F. C. Mut. Aid & Ben. Asso. 96 Ill. 309; Masonic Mut. Ben. Soc. v. Burkhart, 7 West. Rep. 529, 110 Ind. 189.

The certificate constitutes the contract, and the holder thereof has power to change the beneficiary. Presbyterian Assur. Fund v. Allen, *supra*; Elkhart Mut. Aid, Benev. & Relief Asso. v. Houghton, 1 West. Rep. 284, 103 Ind. 286, 53 Am. Rep. 514; Bauer v. Samson Lodge, K. of P. 102 Ind. 262.

member; and it shall be lawful for such association, society, or incorporation to change the name or names of the payee or payees, beneficiary or beneficiaries, named in such certificate of membership, policy, or other evidence of interest, on such terms and conditions as the parties to the contract may agree to." Section 1 of the Act (section 3848, Rev. Stat. 1881) relates to the same associations, and exempts such benefits from all claims of creditors.

In the case of *Masonic Mut. Ben. Society* v. *Burkhart*, 110 Ind. 189, 9 West. Rep. 92, it is said: "The general rule applicable to beneficiary or charitable associations is that the beneficiary acquires no vested right to the benefits which are to accrue upon the death of a member, until the death of the member occurs." In that case the member procured the cancellation of the original certificate, in which his wife was designated as the beneficiary, and procured the issuance of a new certificate, in which his son was designated as the beneficiary, without the knowledge or consent of his wife, the beneficiary in the original certificate, and on his death payment was made to the son, and it was held proper, and that the wife had no interest in the certificate. The authorities are collected in that case, fully supporting the conclusion of the court. It does not appear in this case that the association in any way prohibited the changing of beneficiaries, or that they had any prescribed mode by which the change should be made. It follows, therefore, that the member had the right to change the beneficiary, with the consent of the association. The member did change the beneficiary, by an assignment of the policy, and directing the association to pay the same to the plaintiff, and she brings suit upon it. The association does not question this mode of making the change, or object to it, or refuse to pay the policy, but, when sued, other persons are claiming the fund, and it interpleads, and pays the money into court. A policy of insurance may be assigned by the beneficiary or owner, and, when the beneficiary has no vested interest, it may be assigned by the member of the association. *Swift* v. *Railway Pass. & F. C. Mut. Aid & Ben. Asso.* 96 Ill. 309; *Harley* v. *Heist*, 86 Ind. 196; *Lamont* v. *Hotel Men's Mut. Ben. Asso.* (Circ. Ct. N. D. Ill.) 30 Fed. Rep. 817.

In *Grand Lodge A. O. U. W.* v. *Child*, 14 West. Rep. 454, it was held that the member might change the beneficiary, though the change was made against the refusal of the association, and not in conformity with the prescribed mode adopted by the association. *Knights of Honor* v. *Watson* (N. H.) 6 New Eng. Rep. 888; *Martin* v. *Stubbings* (Ill.) 18 N. E. Rep. 657.

We think the assignment operated as a change of the beneficiary, and made the plaintiff the beneficiary of the certificate; but on the theory that the policy named a beneficiary, and the person or persons so named took a vested interest, it named the heirs of the insured, who were his mother and brother, and he inherited the interest they had, if any, before he made the assignment, and he had the right to assign such interest. *Harley* v. *Heist*, *supra*.

It is contended that the doctrine held in the case of *Harley* v. *Heist*, *supra*, would entitle the administrator of Milner to the funds, but in this counsel are in error. In that case it was an ordinary life policy, in which the rights of the beneficiary were fixed, and it was the administrator of the beneficiary who recovered the funds, the beneficiary having died previous to the death of the insured, without having assigned the policy. The insured, after the death of the beneficiary, assigned the policy, and it was held that the assignment passed the interest the insured inherited from the beneficiary, but it was subject to the payment of her debts, and her administrator was entitled to the money upon the policy. If the mother and brother of Sylvanus Milner could be said to be the beneficiaries with a vested interest, which descended to Sylvanus at their death, subject to the right of their administrators to collect the whole, it is shown that their estates are settled, and their debts all paid; but in the certificate in this case the beneficiaries had no interest, and the insured had the right to change the beneficiary, and designate another, at any time during his life.

It is further contended that the plaintiff had no insurable interest in the life of the member Milner, and therefore she derived no title by the assignment, and cannot recover on the policy. In this case the insured was the real contracting party, and paid all the premiums up to the date of his death, and every person has an insurable interest in his own life.

When the person himself in good faith makes the contract, procures the insurance on his own life, and pays the premiums, it is immaterial whether the beneficiary designated by him or the assignee of the policy has any insurable interest in the life of the insured or not. This doctrine is settled by this court, and is in accordance with the decided weight of authority. *Amick* v. *Butler*, 111 Ind. 578, 9 West. Rep. 842; *Hutson* v. *Merrifield*, 51 Ind. 24; *Provident L. Ins. & Inv. Co.* v. *Baum*, 29 Ind. 336; *Burton* v. *Connecticut Mut. L. Ins. Co.* 21 N. E. Rep. 746; *St. John* v. *Am. Mut. L. Ins. Co.* 13 N. Y. 31, 64 Am. Dec. 529. See note to *Morrell* v. *Trenton Mut. L. & F. Ins. Co.* 10 Cush. 282, 57 Am. Dec. 103, where the question is discussed and authorities are collected; *Clark* v. *Allen*, 11 R. I. 439, 23 Am. Rep. 496.

The cross-complaint of Larkin, administrator, alleges, in addition to the fact that the plaintiff had no insurable interest in the life of the insured, that Milner, the insured, was insolvent at the time of his death. This is a mere conclusion. If it was properly pleaded, it would not affect the assignment, as it does not appear but that he was perfectly solvent at the time he made the assignment.

It is contended by the appellants, the heirs of said Milner, that the words "heirs" and "legal representatives" of the insured should be held to mean the next of kin, and that the policy was payable at the death of Milner to his next of kin, the appellants. What we have heretofore said disposes of this question. The beneficiary took no vested interest during the lifetime of the member, and the member had the right to change the beneficiary, which he did by the assignment, and designated the plaintiff Clara J. Bowman as the person to whom the amount due on the certificate should be paid. It follows from the conclusion we have reached that the court erred in sustaining

the demurrers of Jesse Milner *et al.*, the heirs of Sylvanus Milner, to each paragraph of the plaintiff's complaint, in sustaining the demurrers of Larkin, administrator, to each paragraph of the plaintiff's complaint, and in overruling the demurrer of the plaintiff Bowman to the cross-complaint of Larkin, administrator.

Judgment reversed, at costs of appellee Larkin, administrator, with instructions to the court below to proceed in accordance with this opinion.

ALABAMA SUPREME COURT.

CHEWACLA LIME WORKS, *Appt.*,
v.
DISMUKES *et al.*

(.....Ala.....)

1. Where the declared objects of a corporation are the mining and manufacture of lime and putting the product on the market, it has no implied authority to carry on a general mercantile business, nor can it buy lime manufactured elsewhere for the purpose of trade, and to raise funds to carry on the corporate business.

2. In this State a corporation is not estopped, by reason of having received the benefit of a contract which is *ultra vires*, from setting up its invalidity in defense of a suit brought to enforce it.

(May 10, 1889.)

APPEAL by defendant from a judgment of the Circuit Court of Lee County in favor of plaintiff in an action for the price of goods sold. *Reversed.*

The facts are stated in the opinion.

Messrs. **A. & R. B. Barnes** and **Harrison & Ligon,** for appellant:

The contracts of corporations which they have no authority to make are void and the

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NOTE.—*Corporation: powers restricted to those conferred by statute.*

A corporation, being a mere creature of the law, possesses those powers only which are given to it by its charter, either expressly or impliedly, as necessary in strict furtherance of the objects of its creation. Huntington v. Nat. Sav. Bank of D. C. 96 U. S. 388 (24 L. ed. 777); Beaty v. Knowler, 29 U. S. 4 Pet. 152 (7 L. ed. 813); Runyan v. Coster, 39 U. S. 14 Pet. 122 (10 L. ed. 382); Russell v. Topping, 5 McLean, 194; Montgomery v. Montgomery & W. Pl. Road Co. 31 Ala. 76; Vandall v. South San Francisco Dock Co. 40 Cal. 83; New London v. Brainard, 22 Conn. 552; Fuller v. Plainfield Academic School, 6 Conn. 532; Oecum Co. v. Sprague Mfg. Co. 34 Conn. 541; Winter v. Muscogee R. Co. 11 Ga. 438; Bowling Green & M. R. Co. v. Warren County Court, 10 Bush (Ky.) 712; Weckler v. First Nat. Bank, 42 Md. 581; Pa. D. & M. Nav. Co. v. Dandridge, 8 Gill & J. 248; Davis v. Old Colony R. Co. 131 Mass. 259; Rochester Ins. Co. v. Martin, 13 Minn. 59; Mobile & O. R. Co. v. Franks, 41 Miss. 511; Abby v. Billups, 35 Miss. 618, 72 Am. Dec. 143; Matthews v. Skinker, 62 Mo. 329; Ruggles v. Collier, 43 Mo. 353; Downing v. Mt. Washington Road Co. 40 N. H. 231; South Newmarket Meth. Sem. v. Peaslee, 15 N. H. 330; Le Couteulx v. Buffalo, 33 N. Y. 333; Auburn & C. Road Co. v. Douglass, 9 N. Y. 444; Brady v. New York, 20 N. Y. 312; People v. Utica Ins. Co. 15 Johns. 358; White's Bank v. Toledo F. & M. Ins. Co. 12 Ohio St. 601; Overmyer v. Williams, 15 Ohio, 31; Straus v. Eagle Ins. Co. 5 Ohio St. 59; Diligent Fire Co. v. Com. 75 Pa. 291; Wolf v. Goddard, 9 Watts (Pa.), 550; Pa. R. Co. v. Canal Comrs. 21 Pa. 9; Com. v. Erie & N. E. R. Co. 27 Pa. 339; Northeastern R. Co. v. Payne, 8 Rich. L. (S. C.) 177; Shawmut Bank v. Plattsburgh & M. R. Co. 31 Vt. 491.

Conceding the rule applicable to all statutes, that what is fairly implied is as much granted as what is expressed, it remains that the charter of a corporation is the measure of its powers, and that the enumeration of these powers implies the exclusion of all others. See also Green Bay & M. R. Co. v. Union Steamboat Co. 107 U. S. 98 (27 L. ed. 413); Northwestern Fertilizing Co. v. Hyde Park, 97 U. S. 659 (24 L. ed. 1036); St. Clair Co. Turnpike Co. v. Illinois, 96 U.S. 63 (24 L. ed. 651); Dartmouth College v. Woodward, 17 U. S. 4 Wheat. 636 (4 L. ed. 629); Perrine v. Chesapeake & D. Canal Co. 50 U. S. 9 How. 184 (13 L. ed. 92); Bank of Augusta v. Earle, 38 U. S. 13 Pet. 587 (10 L. ed. 274); Thomas v. West Jersey R. Co. 101 U. S. 71 (25 L. ed. 950); Chicago Gaslight & Coke Co. v. People's Gaslight & Coke Co. 11 West. Rep. 67, 121 Ill. 530; Franklin Bank v. Commercial Bank, 36 Ohio St. 355; Balsley v. St. Louis, A. & T. H. R. Co. 6 West. Rep. 462, 119 Ill. 68.

Only such powers and rights can be exercised under them as are clearly comprehended within the words of the Act or derived therefrom by necessary implication, regard being had to the objects of the grant. Minturn v. Larue, 64 U. S. 23 How. 435 (16 L. ed. 574); Charles River Bridge v. Warren Bridge, 36 U. S. 11 Pet. 422 (9 L. ed. 773); Mills v. St. Clair Co. 49 U. S. 8 How. 569 (12 L. ed. 1201); Fanning v. Gregoire, 57 U. S. 16 How. 524 (14 L. ed. 1043).

When a body corporate transcends the limitations imposed by its charter, the defect cannot be cured by the acts or representations of its officers or agents, or even by an express recital that an authority exists which is in fact wanting. Redress must be sought in a suit to recover back the consideration, or an action on the case against the persons guilty of the fraud; although it has been held that an estoppel may grow, even under these circumstances, out of a long continued acquiescence in or enjoyment of the fruits of the contract. Hood v. N. Y. & N. H. R. Co. 22 Conn. 502; State v. Hancock Co. 11 Ohio St. 183; Hopple v. Brown Twp. 13 Ohio St. 311; Ang. & A. Corp. § 256; State v. Van Horne, 7 Ohio St. 327; Goshen Twp. v. Springfield, Mt. V. & P. P. Co. 12 Ohio St. 624; Herman, Estoppel, 510.

Where a corporation is created by legislative enactment, for particular purposes, with special powers, its deed, though under its corporate seal and that regularly affixed, does not bind it, if it appears by the express provisions of the statute creating it, or by reasonable inference from its enactments, that the deed was *ultra vires*. The question of estoppel is—whether it can reasonably be made out from the statute that the covenant is *ultra vires*, or, in other words, forbidden to be entered into by either the plaintiffs or defendants. Royal British Bank v. Turquand, 5 El. & Bl. 248, affirmed in error, 6 El. &. Bl. 327; Shrewsbury & B. R. Co. v. Northwestern R. Co. 6 H. L. Cas. 113; Agar v. Athenæum L. Assur. Society, 3 C. B. N. S. 725; Prince of Wales L. & Ed. Assur. Co. v. Harding, El. Bl. & El. 183; Bateman v. Ashton-Under-Lyne, 3 Hurlst. & N. 323; Simpson v. Westminster Palace Hotel Co. 6 Jur. N. S. 985.

courts cannot enforce them. Such contracts are *ultra vires*, and no right of action can spring out of them.

Marion Sav. Bank v. *Dunkin*, 54 Ala. 471; *Chambers* v. *Falkner*, 65 Ala. 448; *Montgomery* v. *Montgomery & W. Pl. Road Co.* 31 Ala. 76; *Grand Lodge of Ala.* v. *Waddill*, 36 Ala. 313; *Smith* v. *Alabama L. Ins. & T. Co.* 4 Ala. 558; *Central R. & Bkg. Co.* v. *Smith*, 76 Ala. 572.

Pleas having been interposed by defendant in the lower court and without demurrer issue joined upon the same, and the evidence in the case establishing the facts set forth in the defendant's pleas, the affirmative charge should probably have been given for the defendant and not for the plaintiff, and the verdict have been accordingly.

Columbus & W. R. Co. v. *Wood*, 86 Ala. 164.

Mr. **J. M. Chilton** for appellees.

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

By an Act of the General Assembly, amending the Act "to Incorporate the Chewacla Lime Company," the name of the corporation was changed to the "Chewacla Lime-Works." The fifth section of the amendatory Act provides "that the said Chewacla Lime-Works shall succeed, and does hereby succeed, to all the rights, privileges, immunities, and franchises and property that was of and belonging to the said Chewacla Lime Company, and shall be subject to all liabilities and charges legitimately due from the said Chewacla Lime Company." Acts 1882-83, p. 369.

This action was commenced in the justice's court, and was brought by appellees to recover the price of goods, which the indorsement on the summons avers were sold to the Chewacla Lime-Works, by which name the corporation is sued, while the evidence shows that the goods were sold to the Chewacla Lime Company before the amendment of the charter. On appeals from judgments of justices of the peace, the cause "must be tried *de novo*, and according to equity and justice, without regard to any defect in the summons or other process, or proceedings before the justice." Code 1886, § 3405.

The corporation, notwithstanding the change of name, is one and the same entity. The averments of the statement of the cause of action might have been more formal, but there is no substantial variance between them and the proof.

It clearly appears that, at the time of the sale and delivery of the goods the corporation was engaged in carrying on a general mercantile business, for which purposes they were bought. The material ground on which the defendant resists a recovery is that the Chewacla Lime Company had no authority to engage in such business, and that the contract of purchase is *ultra vires*. The question raised involves the application of only a few principles of law, which may be regarded elementary. As corporations derive their existence and capacity from a special statute, or a general law, empowering them to organize, they cannot exercise any power, or act in any capacity, not authorized by the Act of incorporation or the general law. A corporation has no implied authority to engage in any business other than the particular enterprise for which it is chartered, or to do any act, or make any contract, not in pursuance of the purposes for which it was created. Authority to carry on a particular business includes authority to conduct it in the usual and customary modes. Within the scope and purview of the chartered powers, the business for which the corporation was chartered may be conducted in the same manner as individuals would conduct the same enterprise under similar circumstances; but any transaction or contract beyond this, not necessary or proper to enable the corporation to answer the purposes of its creation, is void.

The grant of powers conferred on the Chewacla Lime Company by the original Act of incorporation, on which plaintiffs base their authority, is in the following language: "Shall be and are hereby made able and capable in law to have, purchase, receive, possess, and enjoy, and realize, to them and their successors, lands, rights, tenements, hereditaments, goods, chattels, and effects, in any amount the body corporate may deem necessary to carry all the objects of said corporation into full force and effect, which objects are to mine lime rock, and manufacture the same, and to keep up and run such machinery as may be necessary to saw lumber and make barrels for the packing of said lime, and the same to sell, devise, grant, alien, and dispose of." Acts 1862, p. 127.

It is manifest that the Act of incorporation grants no express authority to engage in a general mercantile business. Is there implied authority? The declared objects of the corporation are the mining and manufacture of lime rock, and putting the product in a marketable condition. These purposes constitute limitations upon the exercise of the express and implied powers. There may be circumstances under which a manufacturing company would have implied authority to connect a supply store with the business of the corporation, as being ancillary thereto. In such case, the real and primary object must be auxiliary to the main enterprise of the corporation, for the purpose of providing supplies for the employés and laborers, founded on necessity arising from situation and condition. No circumstances are shown which bring the present case within this exception. A general mercantile business does not pertain to the purposes of mining and manufacturing lime rock. They are separate and distinct in their nature and objects.

A coal mining company has no implied authority to buy coals in the market for the purpose of resale as a speculation. *Alexander* v. *Cauldwell*, 83 N. Y. 480.

A corporation authorized and organized to manufacture lime cannot buy lime manufactured elsewhere for the purpose of trade, in order to raise funds to carry on the corporate business. As well might such corporation engage in any other distinct business as that of merchandising, because it may be deemed profitable, and will thus contribute, indirectly, to promote the objects of the corporation. A general mercantile business being a distinct branch of business, the Chewacla Lime Company had no authority, expressed or implied, to engage in carrying on the same.

The established rule in this State is that a corporation is not estopped, by reason of hav-

ing received the benefits of a contract which is *ultra vires*, from setting up its invalidity in defense of a suit brought to enforce it. *Sherwood* v. *Alvis*, 83 Ala. 115.

The circuit court erred in giving the affirmative charge in favor of the plaintiffs.

Reversed and remanded.

MASSACHUSETTS SUPREME JUDICIAL COURT.

Nathan MATTHEWS, Jr.,
v.
Ellen Sturgis DIXEY.

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

1. Where the deeds, from the same grantor to two adjoining owners of land, contain, each the provision that the center of the partition wall of the house first erected on the land shall be placed on the division line between the separate granted premises, and the party first building such partition wall shall be entitled to receive from the other party using the wall one half of its actual cost, this gives mutual and equal rights in the party-wall to each of said adjoining owners and to the land upon which it stands, and the payment of one half of its cost is not a condition precedent to such right.

2. Either of such owners can use the party-wall first erected by the other, and can carry it up as the party-wall of such house as he may have occasion to erect, if he does not injure or impair the wall as originally built, and may make such changes in the foundation of the wall as are necessary for that purpose.

3. The provision in the deed applies to every part of the line between the adjoining owners and is not limited to such part as may be first built against, and one owner, for the purpose of erecting his house, may extend the wall built by the other on the line in the rear.

(September 2, 1889.)

BILL in equity to restrain defendant from making a proposed use of a party-wall. A single justice of the Supreme Judicial Court dismissed the bill and reported the case to the full court. *Decree affirmed.*

The facts fully appear in the opinion.

Mr. **N. Matthews** for plaintiff.

Messrs. **H. H. Sprague** and **J. L. Thorndike,** for defendant:

The meaning of the words of a written instrument is sometimes modified for the purpose of avoiding an absurdity, but never for the purpose of producing one.

See *Grey* v. *Pearson*, 6 H. L. Cas. 106.

The right of the plaintiff to build a fence on the division line was given him by law.

Sparhawk v. *Twichell*, 1 Allen, 451.

W. Allen, J., delivered the opinion of the court:

The parties own adjoining lots on the north side of Beacon Street in Boston. Both parties claim under the Boston and Roxbury Mill corporation which formerly owned the land extending northerly from Beacon Street to the Harbor Commissioners' line and westerly from Hereford Street to West Chester Park. March 15, 1886, the corporation conveyed to William Simes a parcel of this land measuring seventy-seven feet on Beacon Street, and on the 24th of April, 1886, it conveyed to Nathan Matthews another parcel forty-eight feet in width lying westerly of and adjoining the land conveyed to Simes. Each deed contained the following provision: "The centre of the easterly and westerly partition walls of the houses and buildings first erected on said lands shall be placed on the division lines between the granted premises and the adjoining lots, and shall be good and sufficient walls, and the party first building such partition wall, whether the owner of the premises hereby granted or of an adjoining lot, shall be entitled to have and receive from the party using the wall one half of the actual cost of so much of said wall, including the pile foundations and stone and brick work and fences, as he shall actually use."

The center of the easterly wall of plaintiff's house coincides with the dividing line between his lot and defendant's. The wall is twelve inches thick and fifty-five feet high. The defendant is proposing to build a house upon her land higher and deeper than the plaintiff's and for that purpose to carry up the partition wall built by the plaintiff to a height of over sixty feet, and to extend it twelve feet in the rear.

To carry up the existing wall to the height to which the defendant proposes to carry it, it will be necessary, in order to comply with the building law, Stat. 1865, chap. 374, to add four inches to the thickness of the wall below the third story of the house, and to widen the foundation. The defendant proposes to add to the thickness of the wall and foundation on her own land, but it is contended by the plaintiff that it will not be practicable to get a sufficient foundation without renewing the existing foundation, and, perhaps, extending it somewhat further in the plaintiff's land. If this is rendered necessary by a proper use which the defendant makes of the existing wall, we see no objection to it. If the foundation is insufficient for a proper use which the defendant proposes to make of the wall, or for such a wall as the defendant has a right to have, the right to strengthen or enlarge the foundation so as to make it sufficient is implied. If the defendant has a right to carry up the wall she has a right to put in a foundation sufficient therefor, doing no injury to the existing wall. *Standard Bank* v. *Stokes*, L. R. 9 Ch. Div. 68; *Eno* v. *Del Vecchio*, 4 Duer, 53; *Field* v. *Leiter*, 6 West. Rep. 54, 118 Ill. 17.

The right claimed by the defendant is to carry up the partition wall built by Matthews. Whether she has that right depends upon the construction to be given to, and the inferences to be drawn from, the deed to Simes, her grantor. The provision in the deed is somewhat blind, but on examination its meaning becomes evident. It may be assumed that the

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NOTE.—See Everett v. Edwards, *post*, 110.

5 L. R. A.

See also 9 L. R. A. 637; 17 L. R. A. 409; 19 L. R. A. 240; 22 L. R. A. 632; 33 L. R. A. 294; 37 L. R. A. 462.

grantor owned a large tract of land which it was selling in parcels to be built upon. It may also be assumed that the provision was intended as a general provision to be applied to all the land sold, and to be inserted in all deeds of it, and that it was contained in the deed of the land that had been sold adjoining the Simes land on the east. The land conveyed to Simes was of sufficient width for several buildings. The words "the easterly and westerly partition walls of the houses . . . first erected on said land shall be placed on the division line between the granted premises and the adjoining lots," plainly do not mean all partition walls between houses built on the land, but party-walls of houses built on the easterly or westerly lines of the land conveyed. It was a grant of a right to build a party-wall upon both the eastern and western sides of the lot, one half of which should be upon land not included within the lines of the description. This gave a right or interest or estate in the adjoining land which it is not necessary to attempt to name. The same right that was granted to the grantee was also reserved to the grantor. If this would not be inferred from the mere grant of the right to build a party-wall, which is built upon both estates and belongs to both, the terms of the grant show that the benefit of the grantor, equally with the grantee, was intended. It not only gave the grantee the right to build a party-wall, but gave the grantor the right to require that no wall of a building except a party-wall should be built adjoining his line; and it further provides for the case of the erection of "such walls" by the owner of "an adjoining lot." It is also to be considered that the provision was probably intended to be applied to all parcels sold, and to give mutual rights to and in party-walls to the purchasers of different parcels, and that could not be done unless the grantor reserved to himself, in the land conveyed, the same rights which he granted in the land not conveyed.

The deed to Simes bounds his land on the east on land "recently conveyed by this corporation to W. J. Saltonstall," but, unless the right to build a party-wall on the land was reserved in the deed to Saltonstall, the grant to Simes of that right would be nugatory; unless the right was reserved in the deed to Simes, it could not have been granted to Matthews, and the plaintiff would now be unlawfully or by mere license, maintaining a wall on the defendant's land. The true construction of the provision is that when the corporation conveyed to Simes it gave and reserved the mutual right to build a party-wall upon the line between them, with the further provision that neither party should make the wall of a house which he might erect on the line a several wall on his own land adjoining the line, but a party-wall one half upon each estate. This is the meaning and effect of the provision in regard to the building first erected on the land.

The plaintiff then, as possessing the rights reserved by the grantor in the deed to Simes, and the defendant as possessing the rights granted to Simes by that deed, have equal and mutual rights in relation to a party-wall. It is immaterial that the defendant claims under the elder deed because the same right that was granted by that in the plaintiff's parcel was reserved in the defendant's. It is immaterial that the defendant has not paid to the plaintiff any of the costs of the wall. That is in no sense a condition precedent to the possession or the exercise of the right of the defendant in the party-wall.

The plaintiff claims that the grant to erect a party-wall is to the owner who shall first put up a building on the line, and is limited to such good and sufficient wall as shall be first erected. The general intention of the provision is that the walls of adjoining buildings on the lines of the land conveyed shall be party-walls, and this is secured by providing that the wall first built on the line shall be a party-wall. Before any wall is erected either owner may build such a wall as he has occasion to use, being a good and sufficient wall. After the wall is built, it is a party-wall and the ordinary rights and incidents of a party-wall exist. The other owner can use it for any purpose which a party-wall, upon the enjoyment of which no special restrictions are placed, can by law be used. One of these purposes and uses is to build upon it, if either owner has occasion to carry it up. *Everett* v. *Edwards, post*, 110 (Suffolk Sept. 5, 1889).

This case furnishes an apt illustration of the rule. The Boston and Roxbury Mill corporation authorized and required Simes, if he should put up a two-story house upon the line, to make the wall of it a party-wall. Did it intend to preclude itself and its assigns from using that wall for anything higher than a two-story building, and from ever putting up a three or five-story house on the line without building up a several wall from the foundation on its side of the line? Did it intend that the accident of a first erection should determine the height to which either owner could ever carry up the wall?

By giving the natural and reasonable construction to the provision, that the walls of buildings erected on the line should be party-walls in which the parties should have equal rights, the plain intention of the grantor will be carried out. Either party can use the wall as it is, and either party can carry it up as the party-wall of such house as he may have occasion to erect, in neither case injuring or impairing the wall as originally built.

The plaintiff objects that the addition of four inches to the thickness of the wall below the third story, which the defendant proposes to make on her side of the wall, will not be compliance with the law which requires a wall sixteen inches in thickness. The report finds that the defendant does not intend to do anything which she may not be permitted to do under the laws by the inspector of buildings. This renders it unnecessary to consider whether it would be a ground for the interference of the court at the suit of the plaintiff, if it appeared that the defendant intended or threatened to violate the building law.

The report finds that the wall, with the additional thickness proposed to be added by the defendant, will be amply sufficient, and it does not appear that the original wall will be weakened, or the plaintiff injured by the changes proposed by the defendant. We think that

the defendant has a right to carry up the wall, and to make such changes in the foundations as are necessary for that purpose.

The defendant also proposes to extend the wall twelve feet in the rear. This is the building of a new wall rather than the enlargement of the original one, for it is not to be upon land occupied by that. Without relying upon the technical point that the defendant's building is the first one to be erected on the land conveyed to Simes, we think that the provision was intended to apply to every part of the line, and cannot be limited to such part as may first be built against. It was intended to include every wall of a building first erected on any part of the line.

The board fence put up by the plaintiff was not the wall of a house or building, nor was it built one half on each side of the line.

Decree affirmed.

George E. BULLARD *et al.*, Exrs., *etc.*,
v.
Seth CHANDLER *et al.*

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

1. Under a will giving to a certain person a sum of money, "which after his death shall revert to the town" on condition that it shall support a minister, "in which case all interest accruing on the above sum shall be used to aid in payment of his salary, failing which it shall revert to my heirs at law," such person is entitled to the interest of the money only, and where the executors are appointed as trustees, they should hold the sum in trust during such person's life, properly investing the same and paying him the income thereof.

2. A trustee cannot request instructions of the court as to what may be his duty upon the happening of future contingencies.

3. A gift is charitable where a fund is to be permanently maintained and its income devoted to the relief of the poor and unfortunate although its distribution is private and to private persons.

4. The word "others" refers to the last antecedent unless there is something in the subject-matter requiring a different construction, upon a direction that income is to be applied "to the relief and comfort of the poor and unfortunate whom we have aided in past years and also to others as their judgment may dictate."

5. A devise of money "to constitute a fund to be well invested, the income from which I desire my sisters to apply to the relief and comfort of the poor and unfortunate whom we have aided in past years, and also to others as their judgment may dictate," and which is declared by the will to be "strictly for private charities," the fund to be known by a certain name, constitutes a devise for purposes of a public charity, which equity will protect and enforce.

(June 25, 1889.)

BILL for instructions, filed by an executor of a will as to the interpretation of certain paragraphs therein. *Instructions accordingly.*

The facts are stated in the opinion.

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

NOTE.—*Bill for construction of will and for directions to trustees.*

A court of chancery will maintain a bill by executors or trustees to obtain a construction of a will, and the direction of the court as to the disposition of the property. See Lorillard v. Coster, 5 Paige, 172; Cross v. De Valle, 68 U. S. 1 Wall. 15 (17 L. ed. 519).

In a bill in equity, filed by trustees for the instruction of the court in the execution of their trusts, the question being whether certain dividends of stock and money, received by the trustees from various railroad corporations, are to be treated as income or as part of the principal which is to go to the lineal descendants, the trustees are mere stockholders, having no interest in the question, and equally bound to protect the rights of the tenant for life and those interested in the remainder. The real parties to the controversy are the life tenant on the one side, and the other descendants on the other; and such descendants, now in being, must be made parties to the suit before the question of removal of the cause can be decided by the court. Gordon v. Green, 113 Mass. 260; Hawley v. James, 5 Paige, 318, 442; Armstrong v. Lear, 33 U. S. 8 Pet. 52 (8 L. ed. 863); Cross v. De Valle, 68 U. S. 1 Wall. 1 (17 L. ed. 515); Harvey v. Harvey, 4 Beav. 215; Leland v. Hayden, 102 Mass. 542; Story, Eq. Pl. § 207.

Assuming that the contestants have a contingent interest in the personal estate of the testator, their present application is one which would not now be entertained and passed upon. Jones v. Hamersley, 4 Dem. 436.

Equitable conversion under power of sale in will.

It is the duty of the court to consider the real estate of the testator converted immediately into money, under the full power of sale, if by so doing the will can be carried into effect. Phelps v. Phelps, 28 Barb. 144; Conover v. Hoffman, 1 Bosw. 224.

Doctrine of conversion of real property into personalty. See Cottman v. Grace, 3 L. R. A. 145, *note*, 112 N. Y. 299; Lindley v. O'Reilly, 1 L. R. A. 80, *note*, 13 Cent. Rep. 309, 50 N. J. L. 636.

Equity looks upon that as done which ought to have been done.

Equity treats the subject-matter as to collateral circumstances and incidents in the same manner as if the contemplated act had been performed exactly as it ought to have been done. Manice v. Manice, 43 N. Y. 372; 1 Story, Eq. § 64, *g*; 2 Story, Eq. §§ 790, 1212, 1214; Bunce v. Vander Grift, 8 Paige, 37, 40; Fletcher v. Ashburner, 1 White & T. Lead. Cas. in Eq. 3d Am. ed. *notes*, p. 868; Kane v. Gott, 24 Wend. 660.

The whole doctrine of equitable conversion depends upon this well-established and familiar principle. And it will be followed so far as the contract of the parties, or the will of the decedent, can be carried into effect without violating any equitable principle or rule of law. Walker v. Denne, 2 Ves. Jr. 170; Griffith v. Ricketts, 7 Hare, 299; Taylor v. Taylor, 3 De G. M. & G. 190; Holland v. Cruft, 3 Gray, 162, 180; Prentice v. Janssen, 79 N. Y. 478; Power v. Cassidy, 79 N. Y. 602; Van Vechten v. Keator, 63 N. Y. 52; Moncrief v. Ross, 50 N. Y. 431; White v. Howard, 46 N. Y. 144; Hood v. Hood, 85 N. Y. 561; Delaney v. McCormack, 88 N. Y. 174; Wells v. Wells, 88 N. Y. 323; Lawrence v. Elliott, 3 Redf. 235; Klock v. Buell, 56 Barb. 398; Arnold v. Gilbert, 5 Barb. 190; 3 Pom. Eq. Jur. 126.

Residuary devise and bequest.

To deprive an heir or distributee of his share of the property which the law gives him in case of intestacy the testator must make a valid and effectual disposition thereof to some other person. Chamberlain v. Taylor, 7 Cent. Rep. 291, 105 N. Y. 185; Haxtun v. Corse, 2 Barb. Ch. 506.

See also 12 L. R. A. 117; 19 L. R. A. 413; 21 L. R. A. 454; 27 L. R. A. 423; 35 L. R. A. 502.

If a gift is absolute and entire in its terms, any limitation afterwards is repugnant and void.

Merrill v. *Emery*, 10 Pick. 511. See also *Ide* v. *Ide*, 5 Mass. 500; *Nightingale* v. *Burrell*, 15 Pick. 104; *Burbank* v. *Whitney*, 24 Pick. 146; *Albee* v. *Carpenter*, 12 Cush. 382; *Kelley* v. *Meins*, 135 Mass. 231; *Sherburne* v. *Sischo*, 3 New Eng. Rep. 431, 143 Mass. 439.

Messrs. **Andrew J. Waterman,** *Atty-Gen.*, and **H. C. Bliss,** *Asst. Atty-Gen.*, for the Commonwealth:

There is no special significance in the use of the solecism "private charities." The words are used by a person not familiar with technical terms, and are intended to indicate that the benefits are to accrue to private persons or individuals, in distinction from gifts to public institutions and public instrumentalities of charitable distribution.

See *Saltonstall* v. *Sanders*, 11 Allen, 446–456.

If the whole context of a will shows that the intention of the testator is to use a term in a sense other than its ordinary legal acceptation, such sense must be adopted.

Robertson v. *Johnston*, 24 Ga. 102. See also *Dugan* v. *Livingston*, 15 Mo. 234; *McKeehan* v. *Wilson*, 53 Pa. 74; *Bartlet* v. *King*, 12 Mass. 537–541; *Holmes* v. *Cradock*, 3 Ves. Jr. 321; *Davis* v. *Boggs*, 20 Ohio St. 550.

There is a sufficient specification of the charity intended by the fourteenth clause of the will. The court says, in *White* v. *Ditson*, 1 New Eng. Rep. 485, 140 Mass. 357: "If the general object of the bequest is pointed out, or if the testator has fixed a means of doing so by the appointment of trustees with the power of selection vested in them, then the gift must be treated as sufficiently definite for judicial cognizance, and will be carried into effect."

See also *Re Schouler*, 134 Mass. 426; *Saltonstall* v. *Sanders*, 11 Allen, 446; *Wells* v. *Doane*, 3 Gray, 201; *Everett* v. *Carr*, 59 Me. 325; *Pocock* v. *Atty-Gen.* L. R. 3 Ch. Div. 342.

The word "others" is in apposition to the words "whom we have aided in past years," and does not add to the class "poor and unfortunate,"—they are others of that class.

See *Kitchen* v. *Shaw*, 6 Ad. & El. 729; *Williams* v. *Golding*, L. R. 1 C. P. 69; *People* v. *Richards*, 11 Cent. Rep. 75, 108 N. Y. 137; *Clark* v. *Gaskarth*, 8 Taunt. 431; Potter's Dwarris, Stat. p. 292.

The words "also to others" refer back to the last antecedent. This clause made an addition to those "whom we have aided."

See Endlich, Interpretation of Statutes, § 414; *Cushing* v. *Worrick*, 9 Gray, 382; *Quinn* v. *Lowell Electric Light Co.* 1 New Eng. Rep. 101, 140 Mass. 106; *State* v. *Conklin*, 34 Wis. 21; *Fowler* v. *Tuttle*, 24 N. H. 9; Potter's Dwarris, Stat. 590; *Reg.* v. *Lichfield*, 2 Q. B. 693.

This is not a personal trust to the sisters which is to die with them and thereafter to be inoperative, for the will manifestly contemplates a perpetuity.

See *Atty-Gen.* v. *Fletcher*, 5 L. J. N. S. (Ch.) 75–78; *Pocock* v. *Atty-Gen.* L. R. 3 Ch. Div. 342; *Moggridge* v. *Thackwell*, 7 Ves. Jr. 36; *Mills* v. *Farmer*, 1 Meriv. 55; *White* v. *White*, 1 Bro. Ch. 12; *Baylis* v. *Atty-Gen.* 2 Atk. 239; *Atty-Gen.* v. *Hickman*, 2 Eq. Cas. Abr. 194; *Doyley*

To exclude what would fall by lapse or invalid disposition, as it may be supposed that the testator did not intend to die intestate as to any portion of his property, the law requires that he should use words limiting the gift of the residue and showing an intention to exclude such portions of his estate as may fail to pass. King v. Woodhull, 3 Edw. Ch. 79, 82; Floyd v. Carow, 88 N. Y. 560, 563; Riker v. Cornwell, 113 N. Y. 127.

Where the residuary bequest is not circumscribed by clear expressions in the instrument, and the title of the residuary legatee is not narrowed by special words of unmistakable import, he will take whatever may fall into the residue, whether by lapse, invalid dispositions or other accident. Roper, Legacies, 1st Am. ed. 453; 2 Wms. Exrs. 7th ed. 1567; 2 Redf. Wills, 2d ed. 115; Bland v. Lamb, 2 Jac. & W. 406; Reynolds v. Kortright, 18 Beav. 427; James v. James, 4 Paige, 115; Van Kleeck v. Reformed Dutch Church, 6 Paige, 600; King v. Strong, 9 Paige, 94; *Re* Benson's Accounting, 96 N. Y. 499; Kerr v. Dougherty, 79 N. Y. 327; Riker v. Cornwell, 113 N. Y. 127.

A general residuary clause, not circumscribed by clear expressions in other parts of a will, includes any property or interests of the testator which are not otherwise perfectly disposed of, and all that for any reason eventually fall into the general residue. Riker v. Cornwell, 113 N. Y. 115.

The English chancery case of Springett v. Jennings, L. R. 6 Ch. App. 333, points out a distinction between an all-comprehending gift of a residue and one which carries a particular residue. Riker v. Cornwell, 113 N. Y. 126.

By "the most destitute of my relatives" the testator meant those comparatively most destitute; and by "their families" he intended his brothers and sisters, their wives and husbands, and his nephews and nieces, their wives, husbands, and children. Gafney v. Kenison, 5 New Eng. Rep. 81, 64 N. H. 356.

Charitable uses.

Since it often happens that definitions are framed from and for particular cases, the court will be content with the views of others of great experience and learning. Perry on Trusts, § 709, says: "Charity has obtained a significance in law, and courts do not uphold or administer trusts for particular purposes which are not charitable within the meaning of the law." Mr. Story adds: "A bequest may, in an enlarged sense, be charitable, and not within the purview of the statute." Another authority it is said writes: "Such charitable bequests only as are within the letter and spirit of the statute" are sustained. See Hutchins v. George, 12 Cent. Rep. 232, 43 N. J. Eq. 127, citing Story, Eq. §§ 1155, 1158, 1164; Kendall v. Granger, 5 Beav. 300; Williams v. Williams, 8 N. Y. 547; Brown v. Yeale, 7 Ves. Jr. 50, *note*; Owens v. Missionary Society of M. E. Church, 14 N. Y. 397, 403.

Again, it is said that all of the purposes to which any charitable bequest can be made may be classified under those which are ecclesiastical, educational, or eleemosynary. See Hutchins v. George, 12 Cent. Rep. 232, 43 N. J. Eq. 127: Atty-Gen. v. Calvert, 23 Beav. 258; Reformed Prot. Dutch Church v. Mott, 7 Paige, 77; Miller v. Gable, 2 Denio, 512.

Previous to the Revised Statutes of New York a pecuniary legacy to a corporation, payable out of the proceeds of real estate, was valid although the corporation was not authorized by its charter to take real estate by devise. Auburn Theological Sem. v. Childs, 4 Paige, 419. Since the Revised Statutes a devise of real estate in trust for a corporation is void unless it is expressly authorized by its charter or by statute to take by devise. *Ibid.*; Leslie v. Marshall, 51 Barb. 562; Goddard v. Pomeroy,

v. *Atty-Gen.* 2 Eq. Cas. Abr. 195; *Copinger* v. *Chechane*, 11 Ir. Rep. Eq. 429.

If the word "others" refers to the "poor and unfortunate," the charity may be sustained even if the gift to those who had been aided "in past years" be regarded as an ordinary trust; for there may be a valid public charity, or charitable use, coupled with ordinary trusts, and both capable of execution under direction of the court.

Doyley v. *Atty-Gen.* 2 Eq. Cas. Abr. 195; *Salusbury* v. *Denton*, 3 Kay & J. 529; *Adnam* v. *Cole*, 6 Beav. 353. See 2 Redf. Wills, 506.

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

This is a bill for instructions, filed by the executor of the will of Mary B. Whitney, as to the interpretation to be given to two paragraphs therein numbered respectively "secondly" and "fourteenthly."

The first of these paragraphs is as follows: 'Secondly, I give and bequeath to my friend Rev. Seth Chandler of Shirley, the sum of $5,000, which, after his death shall revert to the town aforenamed [the Town of Shirley] strictly on this condition, namely, that said town shall support fairly and permanently a Unitarian clergyman; in which case all interest accruing on above sum shall be used to aid in payment of his salary, failing which it shall revert to my heirs at law."

It is contended, on behalf of Mr. Chandler, that he is entitled to have the $5,000 paid to him as his absolute estate upon the ground that the gift to him is absolute in its terms and that any limitation afterwards is repugnant and void. We are not disposed to question the correctness of the rule that where an estate is absolutely given it cannot be cut down to a less estate by subsequent words inconsistent therewith. *Merrill* v. *Emery*, 10 Pick. 511; *Sherburne* v. *Sischo*, 143 Mass. 459, 3 New Eng. Rep. 431.

But in determining whether an absolute estate was given, it is important to consider the whole clause by which it was made, and the other portions of the will.

It would hardly be contended that if the gift to Mr. Chandler had been followed by "during his life," or some similar phrase, that the preceding words which, if they stood alone, would import an absolute gift, could be separated from their immediate context. The word "revert" is obviously used in the sense of "go" or "pass," and the phrase "which after his death shall revert," etc., states that the sum of $5,000 is to go to the Town of Shirley after his death, as the pronoun "which" can refer to nothing but this sum. Unless Mr. Chandler's estate therein is limited to his life, this could not possibly happen.

Again, the testatrix, after providing for the condition, as she terms it, upon which the sum shall go to the town, adds, "In which case all interest on the above sum shall be used to aid in the payment of his salary; failing which, it shall revert to my heirs at law." By the use of the words "above sum" she provides that the interest on the $5,000 shall go to the support of the clergyman, and that if it shall fail that he is supported, the same sum shall go to

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36 Barb. 554; Ayres v. Methodist Epis. Church, 3 Sandf. Ch. 351; King v. Rundle, 15 Barb. 139.

Where the conveyances are to certain persons by name, as trustees, and not to the corporation by its corporate name, and it has capacity to take the legal estate, it is not necessary to inquire whether a conveyance in trust for a religious corporation is now good. Robertson v. Bullions, 9 Barb. 82, 100.

Municipal corporations may be trustees. See Cottman v. Grace, 3 L. R. A. 147, *note*, 112 N. Y. 299.

Charitable trusts under the statutes of various States. *Ibid.*

Public charities; what are.

A charity is a gift to a public use. Piper v. Moulton, 72 Me. 155; Jackson v. Phillips, 14 Allen, 539; Perin v. Carey, 65 U. S. 24 How. 506 (16 L. ed. 711).

The test of a legal public charity is the object sought to be attained, not the motives of the donors of funds. Fire Ins. Patrol v. Boyd, 1 L. R. A. 417, *note*, 120 Pa. 624.

In Jackson v. Phillips, 14 Allen, 556, a charity was defined by Justice Gray as follows: "A charity, in legal sense, may be more fully defined as a gift to be applied consistently with existing laws, for the benefit of an indefinite number of persons, either by bringing their minds or hearts under the influence of education or religion, by relieving their bodies from disease, suffering, or constraint, by assisting them to establish themselves in life, or by erecting or maintaining public buildings or works, or otherwise lessening the burdens of government." Miller v. Porter, 53 Pa. 292; Fire Ins. Patrol v. Boyd, 1 L. R. A. 420, 120 Pa. 645.

To give it the character of a public charity there must appear to be some benefit to be conferred upon, or duty to be performed towards, either the public at large on some part thereof, or an indefinite class of persons. Going v. Emery, 16 Pick. 119; Saltonstall v. Sanders, 11 Allen, 446; Evergreen Cemetery Asso. v. Beecher, 2 New Eng. Rep. 308, 53 Conn. 551; *Re* Deansville Cemetery Asso. 66 N. Y. 569.

A devise or bequest in remainder to such charities as shall be deemed most useful by the executor or administrator of one to whom the property is given for life is valid. Wells v. Doane, 3 Gray, 201.

A corporation the object of which is to provide a general hospital for sick and insane persons is a public charitable institution. McDonald v. Mass. General Hospital, 120 Mass. 432; Gooch v. Asso. for Relief of Aged Indigent Females, 109 Mass. 558. See Stratton v. Physio-Medical Institute, *ante*, 33.

Charitable uses and trusts in general. See Cottman v. Grace, 3 L. R. A. 145, *note*, 112 N. Y. 299.

Gifts designed to promote the public good are charities.

A gift for the support and management of such worthy, meritorious, charitable and educational and religious institutions of a certain faith is valid. Quinn v. Shields, 62 Iowa, 129.

A gift to the general public use, which extends to the poor as well as to the rich, is a charity. Jones v. Williams, Amb. 651; Pell v. Mercer, 14 R. I. 444.

A gift for purposes which are both public and benevolent, particularly when it appears that the gift is inspired, not by any partisan or political motive, but by the simple love of men as men, and by a desire for their permanent good, must be regarded as a charitable gift. Ould v. Washington Hospital for Foundlings, 95 U. S. 303 (24 L. ed. 450); Pell v. Mercer, 14 R. I. 444.

A legacy to a town to build a town house is a charitable bequest. Coggeshall v. Pelton, 7 Johns. Ch. 292.

A gift designed to promote the public good by

her heirs at law,—contemplating throughout the whole clause that this sum is to be kept intact and the income thereof only used by those who may receive the benefit of it. There would certainly be nothing on which the latter portion of the clause could operate if the contention on behalf of Mr. Chandler is correct. It must be held not as a limitation subsequently made and therefore repugnant to the gift, but as a limitation to the gift as made and thus qualifying and defining it. All to which Mr. Chandler is entitled is therefore the income of the sum of $5,000. *Rogers* v. *Am. Board of Comrs.* 5 Allen, 69.

Of this sum the testatrix has at his decease undertaken to make an absolute and final disposition. No case is therefore presented such as arises where the first taker is made the owner of a fund subject to a contingent limitation over upon the occurrence of a certain event, where the money is usually paid to him, as it is his and as the contingency may never happen, and where, if there is danger that it will be wasted, proper security may be required or a trustee appointed.

The general rule is here applicable, that in bequests of money or personal property for life with a bequest over, the first legatee takes the interest or income only, and in the absence of any expressed intention, the property is either paid to a trustee or held by the executor as such. *Hooper* v. *Bradbury*, 133 Mass. 303.

The executors are, by the terms of the will, appointed as trustees and as a trust arises in regard to this sum, they should hold it as such during the life of Mr. Chandler, properly investing the same and paying him the income thereof. This is the only inquiry which concerns the immediate and present duty of the executors. The bill further requests instructions as to whether the Town of Shirley "takes any interest in said sum if it should comply with the conditions specified, or whether said sum shall be paid to the heirs at law, or distributees of the testatrix, or fall in to the residue as disposed of in the fourteenth clause of said will, or what other legal disposition is to be made of said sum." Under this request, various questions have been argued before us as to the ultimate disposal of the fund of $5,000.

It has been contended on behalf of the town that it may take this fund and administer the trust, and also that it may receive the fund, and, the "condition" being illegal and impossible of execution by it, may take it, discharged of the condition; on behalf of the First Parish in Shirley, that the Town of Shirley cannot take the property as trustee, and that as the gift is to a public charity, it will not be allowed to fail, but the court will frame a scheme to carry out the charitable intent of the testator as nearly as possible, appointing a new trustee for this purpose; and the First Parish offers to accept the gift and comply with the conditions on being allowed to add the income of the fund to its own funds devoted to the same charity. On behalf of the heirs-at-law and next of kin of the testatrix, it has been urged that the town cannot take on the condition or for the purpose proposed, and that the parish cannot be enabled to take by interpreting the conditional or limited gift of the testatrix as a general gift to pro-

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the encouragement of learning, science, and the useful arts, without any regular reference to the poor, is a charity. Am. Academy of Arts and Sciences v. Harvard College, 12 Gray, 582.

So a bequest to establish a library and reading room is valid. Drury v. Natick, 10 Allen, 169.

A will directing application of a fund for the benefit of the sabbath school library of either of two societies in the discretion of the trustee is a good charitable bequest. Fairbanks v. Lamson, 99 Mass. 533.

Charitable purposes expressly includes gifts for the maintenance of schools of learning. Tainter v. Clark, 5 Allen, 66, 68; Duke, Charitable Uses, 1, 128; 4 Dane, Abr. 5, 6; Price v. Maxwell, 28 Pa. 23; Franklin v. Armfield, 2 Sneed (Tenn.) 347.

A bequest "for the education of deserving youths" is charitable. Saltonstall v. Sanders, 11 Allen, 454.

A gift to a parish to build and support a public school is a gift to a public charity. Boxford Second Religious Society v. Harriman, 125 Mass. 332; Webb v. Neal, 5 Allen, 575; Atty-Gen. v. Parker, 126 Mass. 216.

So of a gift to a high school. Atty-Gen. v. Butler, 123 Mass. 304; Skinner v. Harrison Twp. (Ind.) 2 L. R. A. 137.

So a devise to inhabitants of a town for support of a school is valid. Nourse v. Merriam, 8 Cush. 11.

The testamentary disposition: "One quarter part of my trust property to be given to educational institutions similar to those mentioned in article 13, and the remaining quarter part of my trust property to be given to charitable institutions similar to those mentioned in article 13." is not invalid simply because indefinite. Rhode Island Hospital Trust Co. v. Olney, 14 R. I. 449.

For educational purposes.

The following bequests have been held valid: For the education of children of this town. Richmond v. State, 5 Ind. 334.

For the education of colored children of the State. *Ex parte* Lindley, 32 Ind. 367.

For the education of the freedmen of the nation. McAllister v. McAllister, 46 Vt. 272; *contra*, Fairfield v. Lawson, 50 Conn. 501.

For the education of all the pauper and poor children whose parents are not able to support them. Williams v. Pearson, 38 Ala. 299; State v. Griffith, 2 Del. Ch. 392; Jones v. Habersham, 107 U. S. 174 (27 L. ed. 401); Newson v. Starke, 46 Ga. 88.

For the promotion of education and science among the Indian and African children and youths of the United States. Treat's App. 30 Conn. 113.

Gifts for religious purposes valid.

A gift to a religious society is valid as a charitable gift. Winslow v. Cummings, 3 Cush. 358; Bliss v. Am. Bible Society, 2 Allen, 334; Pickering v. Shotwell, 10 Pa. 23.

A conveyance of land "in trust for the uses of a Sabbath school and for the diffusion of Christian principles," constitutes a public charity. Moryille v. Fowle, 4 New Eng. Rep. 39, 144 Mass. 109.

As to charitable trusts under statute, see Cottman v. Grace, 3 L. R. A. 145, *note*, 112 N. Y. 299; Mannix v. Purcell, 2 L. R. A. 753, 46 Ohio St. 102.

A bequest of the residue to the Ecclesiastical Society in New London known as the Second Congregational Society, and to the Ecclesiastical Society in the Town of East Lyme, Connecticut, connected with the Congregational church there, known as the Stone Church, was held valid. Coit v. Comstock, 51 Conn. 354.

A bequest in trust forever, the income to be appropriated for the benefit of the "Friends' Meeting," is a charity. Dexter v. Gardner, 7 Allen, 243.

A bequest to a missionary society "to aid in prop-

See also 11 L. R. A. 282.

mote Unitarian preaching in the Town of Shirley; and therefore at the death of Mr. Chandler the words used by the testatrix "failing which it shall revert to my heirs at law," will immediately take effect.

It would be premature to discuss these and similar questions before the life interest of Mr. Chandler expires. It has been often held that one of the principal requisites for the maintenance of a bill for instructions is the fiduciary possession of a fund of which some disposition is required to be made presently. *Putnam* v. *Collamore*, 109 Mass. 509; *Muldoon* v. *Muldoon*, 133 Mass. 111; *Wilbur* v. *Maxam*, 133 Mass. 541.

In *Minot* v. *Taylor*, 129 Mass. 160, a testator had devised property in trust to pay the income to A. for life, with remainder to his children for life, and on their death to pay the principal to A's grandchildren on their respectively coming of age. At the death of the testator A. had one child living who was then unmarried. At the death of A. this child had children living. It was held that the trustee could not ask the instruction of the court on the question whether the devise to the grandchildren was void for remoteness until the death of A.

A trustee has a right to ask the instruction of the court as to his present duties, but not as to what may be his duty in future contingencies.

Whether the powers and duties of towns, or of the Town of Shirley, will be controlled, when the life interest terminates, by the same legislation which now prevails, or whether at that time the First Parish in Shirley will occupy the same relation to religious instruction which it now holds, we cannot say. It is highly probable, certainly, that persons other than those represented before us as the heirs-at-law and next of kin will then be entitled to be heard. For the immediate duty of the trustees the instruction already given is sufficient.

The fourteenth paragraph of the will is as follows: "Fourteenthly: after the above willed division of my estate, should there be still property remaining (to which would be added the legacy or legacies of any person or persons named in article twelfthly, not living at the time of my decease) I wish it to constitute a fund, to be well invested, the income from which I desire my sisters to apply to the relief and comfort of the poor and unfortunate whom we have aided in past years, and also to others as their judgment may dictate. It is strictly for private charities, and may be known to them, as I consider it, as 'the James and George fund.' It is the best monument I can erect for them. If, on the contrary, my property should have shrunk so far as to make it impossible to carry out all the above-named plans, I wish my sisters, nephews and nieces to be paid in full, and the remainder to be divided *pro rata*."

Upon this paragraph the question on which all subordinate inquiries depend, is, whether this gift of income to the three sisters is a gift to them of property to be distributed by them for charitable purposes, in the legal sense of the term. The question is primarily one of construction, and the important phrase is one as to the meaning of which we cannot be much aided by precedents, on account of the varieties of phraseology. If it was simply the gift of a sum of money, the residue of her estate, the income of which was to be distributed by her sisters solely to the poor and unfortunate, there would be no doubt that it came within the class of public charities; and if they were unwilling to execute the trust, it might be executed by others. *Minot* v. *Baker*, 147 Mass. 348, 6 New Eng. Rep. 688.

It is the contention of the heirs that this clause provides for the distribution to a class not the proper objects of charity as well as those who are so, and that thus the whole gift is rendered void. *Nichols* v. *Allen*, 130 Mass. 211–213.

The testatrix provides for a fund to be well invested, the income of which she desires her sisters "to apply to the relief and comfort of the poor and unfortunate." If the sentence

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agating the Holy Religion of Jesus Christ" is a charitable bequest. Hinckley v. Thatcher, 139 Mass. 477.

A bequest to the wardens and vestry of a church for the support of a city missionary is valid. Sohier v. St. Paul's Church, 12 Met. 250; Bartlet v. King, 12 Mass. 537; Burr v. Smith, 7 Vt. 241.

The term "church" imports an organization for religious purposes, and property given to it *eo nomine*, in the absence of all declaration of trust or use, must necessarily imply and intend to be given to promote the purposes for which a church is instituted, the most prominent of which is public worship. Baker v. Fales, 16 Mass. 495.

It is not essential that such body of persons should be incorporated. Johnson v. Mayne, 4 Iowa, 180.

A devise in trust for the benefit of the Catholic Church on testator's farm, and that services should be held in said church for his soul yearly, is a charitable use, clearly defined. Seda v. Huble, 75 Iowa, 429.

It seems, also, that the trust may not be impeached on the ground that the use to which the fund was attempted to be devoted was a superstitious use, as the English statutes against superstitious uses have no effect here. U. S. Const. Amend. art. 1; State Const. art. 1, § 3; Holland v. Alcock, 11 Cent. Rep. 861, 108 N. Y. 313.

But the residuary estate, "to be applied by them for the purpose of having prayers offered in the Roman Catholic Church, to be by them selected, for the repose of my soul and the souls of my family, and also the souls of all others who may be in purgatory," was invalid for indefiniteness. Holland v. Alcock, *supra*.

A bequest of personalty in trust for such works of religion or benevolence as the executors of the will may select is a good gift to charitable uses, when it appears from the will that benevolence is used in the legal sense of charity. Pell v. Mercer, 14 R. I. 412.

Purposes of trust; when separable, the valid may be sustained.

If the purposes of a trust are separable, and some of them must arise within two lives, and there are others which must or may become operative only after the expiration of the two lives, the former may be sustained, but the latter cannot. Post v. Hover, 30 Barb. 322, 33 N. Y. 593; De Peyster v. Clendining, 8 Paige, 295; Haxtun v. Corse, 2 Barb. Ch. 506.

Where a trust is for several purposes, some valid and some invalid, it will be supported so far as it is good, provided such part is separable from the rest and no violence will thereby be done to the testa-

had stopped there, it would not have been contended that any but a charitable use could have been made of the fund. They are followed by the words: "Whom we have aided in past years and also to others as their judgment may dictate."

It is said that the word "others," means not merely others than those we have aided in past years, but "others" than "the poor and unfortunate." This is not so natural a construction as that which treats the first clause describing the beneficiaries together as "the poor and unfortunate," and then dividing them into two classes, those we have aided in past years, and, those, other than they, who are also poor and unfortunate. The word "others" in a clause like this refers to the last antecedent, unless there is something in the subject-matter which requires a different construction. *Cushing* v. *Worrick*, 9 Gray, 382.

Its meaning as thus referred is "others" than those "whom we have aided," and not "others" than "the poor and unfortunate." It is thus with its immediate antecedent, "those whom we have aided," brought within the description of the general class, "the poor and unfortunate," to whom the sisters are authorized to distribute the income of the fund which the testatrix has created. Nor do words, "as their judgment may dictate," empower the sisters to give to any outside this class, but only to make their selection within it.

That a gift should be charitable, there must be some benefit to be conferred upon or duty to be performed towards the public at large or some part thereof or an indefinite class of persons. A bequest for the aid or benefit of defined persons is not a charity, but a trust only, as a gift to be distributed among certain poor families named, or certain persons identified in the bequest. *Thomas* v. *Howell*, L. R. 18 Eq. 198-209; *Liley* v. *Hey*, 1 Hare, 580.

But a gift of a nature such as that of the testatrix does not cease to be a charity because certain persons are named as of the class to be assisted, or even because provision is made that a preference shall be accorded them in the distribution of her bounty. When they are thus provided for as a part of the poor who are to receive the benefit of the donation, its public object and purpose continue, and it is still invested with the character of a public charity. While there is no bequest of the principal to the sisters in terms or any words of succession, which indicate who is to administer the fund after them, the testatrix provides clearly for the formation of a fund which the whole context of the sentence shows is intended to be permanent in its character. It is to be well invested and the income is to be applied by them. She speaks of it as the best monument she can erect for her deceased children and bestows on it their Christian names jointly. There is no bequest of this fund to the sisters who had been carefully provided for in other parts of the will, and the payment of whose legacies is guarded by the last clause of the fourteenth paragraph. The trustees appointed by the will are expected to hold it, although there is no express donation to them. To the sisters is given the right, first to distribute the income, and through them in the first instance the charitable purpose was to be executed. Although the testatrix does not expressly provide for the appointment of others by whom the income shall be distributed, when they shall decease, or if they shall refuse or neglect the duty she has imposed upon them, it cannot be that she expected it would fail. The application of the income of this fund to charity was her dominant object. Having created it, placed it in custody of trustees, confided the distribution of the income to her sisters, devoted to it the residuum of her estate, and left it as a monument to her children, she might well suppose, if her attention was called to the matter, that proper means of executing her purpose could be provided, through the medium of the courts, if, in any matter of detail, her provision therefor was insufficient. The charity intended by the testatrix was clearly specified. "If the general object of the bequest is pointed out, or if the tes-

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ter's general intent. 3 Jarman, Wills, Am. ed. 709; 1 Redf. Wills, 428; Sears v. Putnam, 102 Mass. 9; Benedict v. Webb, 98 N. Y. 460; Bristol v. Bristol, 2 New Eng. Rep. 763, 53 Conn. 257.

A void trust for the accumulation of money does not invalidate the gift of the principal. Robison v. Robison, 5 Lans. 168.

If a good bequest is made to a legatee, subject to an illegal or void direction to accumulate, if such direction is independently ingrafted on the bequest, and can be stricken out without destroying the substantial form of the gift, the gift may be held to be good, and the direction to accumulate void. *Re* Bonard's Will, 16 Abb. Pr. N. S. 206. See Craig v. Craig, 3 Barb. Ch. 76; Martin v. Maugham, 14 Sim. 230; Williams v. Williams, 8 N. Y. 525; Phelps v. Pond, 23 N. Y. 69; Kilpatrick v. Johnson, 15 N. Y. 322; Hawley v. James, 5 Paige, 318; Phila. v. Girard, 45 Pa. 1; Lang v. Ropke, 5 Sandf. Ch. 371.

The valid will be preserved unless they are so dependent upon each other that they cannot be separated without defeating the general intent of the testator. McGrath v. Van Stavoren, 8 Daly, 456; Oxley v. Lane, 35 N. Y. 349; Lang v. Rapke, 5 Sandf. Ch. 363.

Courts lean in favor of a preservation of all such valid parts of a will as can be separated from those that are invalid without defeating the general intent of the testator. Harrison v. Harrison, 36 N. Y. 548; 2 Trans. App. 352; Gott v. Cook, 7 Paige, 521.

The adjudging of a section of a will to be void does not affect or invalidate any previous devises, bequests, or provisions of the will which are distinct from and independent of the limitations in such section. Du Bois v. Ray, 7 Bosw. 297.

In the case of a public charity the intent of the testator will not be defeated because a secondary intent may be illegal, for if it be unlawful it will be disregarded. Manners v. Phila. Library Co. 93 Pa. 165; Fire Ins. Patrol v. Boyd, 1 L. R. A. 420, 120 Pa. 645.

The principle to be applied is well settled, that where a trust is for several purposes, some valid and some invalid, it will be supported so far as it is good, provided such part is separable from the rest, and no violence will thereby be done to the testator's general intent. Bristol v. Bristol, 2 New Eng. Rep. 763, 53 Conn. 257; Sears v. Putnam, 102 Mass. 9; Benedict v. Webb, 98 N. Y. 460; Coit v. Comstock, 51 Conn. 352.

Where the charity is definite, heirs and devisees cannot question the legal capacity of the trustee to hold and administer the trust; the State only can do that. Heiskell v. Chickasaw Lodge, 87 Tenn. 668, 4 L. R. A. 699; Vidal v. Girard, 43 U. S. 2 How. 127 (11 L. ed. 205); *Re* McGraw's Estate, 111 N. Y. 66.

tator has fixed the means of doing so, by the appointment of trustees with the power of selection vested in them, then the gift must be treated as sufficiently definite for judicial cognizance and will be carried into effect." *White* v. *Ditson*, 140 Mass. 357, 1 New Eng. Rep. 485.

The use of the words "It is strictly for private charities," in describing the fund, is relied on as furnishing an argument that the donation of the testatrix is itself a private charity. A gift is charitable where a fund is to be permanently maintained and its income devoted to the relief of the poor and unfortunate, although its distribution is private and to private persons. What the testatrix contemplated was that the mode of administering the charity would be private, and that individuals would receive the benefit of it at the hands of those who administered it rather than by any distribution of it in a more public manner. The mode in which, as it appears from the evidence, she had in her lifetime distributed the sums given by herself in charity, was to individuals. She always gave directly herself, held this to be the best way and would never give to public societies. Those whom she had aided, to whom the allusion is made in the will, are found to have been persons formerly connected with her family and one person whom she never personally knew, but whose poverty or misfortunes had for some reason especially interested her. Her intention is manifested to devote the income of this fund to the general relief of the poor by almsgiving to the needy individually, through the agency of those who administer it. Each individual immediately receiving assistance may be private and the charity may be distributed in private and by a private hand. Such a charity is public and general in its scope and purpose and becomes definite and private only after the individual objects have been selected. *Saltonstall* v. *Sanders*, 11 Allen, 446.

In the general and indefinite character of those who may become beneficiaries of the fund created by the testatrix, this gift is readily distinguishable from that considered in *Kent* v. *Dunham*, 142 Mass. 216, 2 New Eng. Rep. 655, where it was sought to establish as a public charity a gift intended solely for the benefit of the children of the testator and their descendants.

In *Saltonstall* v. *Sanders*, *supra*, where the gift was "in aid of objects and purposes of benevolence and charity, public or private," it was held that the words "public or private" must be taken in their natural meaning and according to the construction given to them in a great majority of similar cases to indicate the mode of distribution only.

The argument for the heirs-at-law and next of kin on this point relies much on the case of *Ommanney* v. *Butcher*, Turn. & Russ. 260, where a testator, after making numerous legacies, added: "In case there is any money remaining I should wish it to be given in private charity;" and it was held that this last bequest was too indefinite to be carried out. This case was carefully examined, compared with previous and subsequent decisions of the English courts, and its authority denied after a full discussion, which it is needless here to repeat, in *Saltonstall* v. *Sanders*. There can be no difficulty by the ordinary procedure and methods of a court of chancery in supervising the execution of such a charity, in compelling, when deemed necessary, the rendition of proper accounts, and in providing that those who administer the income of the fund shall devote it in private charity to the relief of the poor and unfortunate.

The result therefore is, that the fund created by the fourteenth clause of the will is to be held by the trustees named, and that the income thereof is to be paid to the sisters to be applied to the relief and comfort of the poor and unfortunate, including those aided heretofore by themselves and the testatrix in private charities, and as their judgment shall dictate, and that the income will be received by them upon this trust.

Instructions accordingly.

Edward EVERETT
v.
Tay EDWARDS.

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

1. **A party-wall is a substitute for a separate wall** to each adjoining owner, and there can be no implied limitation in his right to use it as he would use his several wall, except that he shall not impair its value to his co-owner.
2. **If one of the two adjoining owners wishes to raise his building** higher than as first erected, he may build up the party-wall to such height as may be necessary for that purpose, although the other adjoining owner may not wish to use the wall as built up, and may prefer not to have the adjoining building higher than his own.
3. **If one owner carries up the wall,** the addition becomes part of the party-wall and the owners have equal rights in it, but neither owner has a right to so use the wall as to weaken or injure it.
4. **Where defendant built up a party-wall higher** than originally erected, and built his house correspondingly higher, an action cannot be maintained by the adjoining owner, plaintiff, to compel defendant to remove so much of the addition of the wall as is on plaintiff's side of the division line.
5. **Such action cannot be maintained** on the ground that the wall was erected contrary to the provisions of Massachusetts Stat. 1885, chap. 374, and of ordinances of the City of Boston, by building up the wall without a permit and by making it of less thickness than is thereby required.

(September 5, 1889.)

BILL in equity to compel defendant to remove a portion of a building standing on a part of the partition wall between his land and that of the plaintiff, and for damages, caused by its erection and maintenance. *Bill dismissed.*

Hearing in the supreme judicial court before Field, *J.*, who reported the case to the full court.

The facts are stated in the opinion.

NOTE.—Party-wall defined. Nalle v. Paggi, 1 L. R. A. 33.

Covenants running with the land, and personal covenants, distinguished. *Ibid.* See Matthews v. Dixey, *ante*, 102.

See also 9 L. R. A. 637; 19 L. R. A. 240; 22 L. R. A. 632.

Messrs. **Robert M. Morse, Jr.,** and **Charles S. Hamlin,** for complainant:

As to all the world except the mortgagee, a mortgagor is the owner of the mortgaged lands, at least until the mortgagee has entered for possession.

Dolliver v. *St. Joseph F. & M. Ins. Co.* 128 Mass. 315.

A mortgagor and mortgagee have no joint interest in lands as against third persons; nor have they distinct interests. Their estates are identical. As to the rest of the world except the mortgagee, the entire estate is in the owner of the equity of redemption.

Having no joint interest, they cannot join or be joined in an application to assess the damages for a nuisance.

Farnsworth v. *Boston*, 126 Mass. 1; *Paine* v. *Woods*, 108 Mass. 160; *Isele* v. *Schwamb*, 131 Mass. 337.

That there were two mortgages on the property, and that the mortgagees had not been made parties, presented no reason why the decree should not be entered ordering the removal of projections of a building.

In *Matts* v. *Hawkins*, 5 Taunt. 20, it was held that where a partition wall had been improperly raised by one of the adjoining owners, the other could lawfully pull down the part which rested on his land.

In *Sanborn* v. *Rice*, 129 Mass. 387, the court held that one owner could maintain an action of tort against the adjoining owner for improperly carrying up the partition wall.

In *Adams* v. *Marshall*, 138 Mass. 228, it was held that where a boundary line ran through a barn, an owner could cut off his end of the barn provided he left the end of the other owner as well supported as it was before.

Where two or more houses so constructed as to require mutual support are conveyed to different owners, or where separate portions of one dwelling become vested in different owners, a right of support, as incident to the property, passes by the conveyance to each grantee, unless excluded by the terms of the grant.

Pierce v. *Dyer*, 109 Mass. 374; *Richards* v. *Rose*, 9 Exch. 218.

There can be by implication no mutual easement of perpetual support applicable to future structures.

Buss v. *Dyer*, 125 Mass. 287; *Carbrey* v. *Willis*, 7 Allen, 364; *Sherred* v. *Cisco*, 4 Sandf. 480; *Huck* v. *Flentye*, 80 Ill. 258; *Dowling* v. *Hennings*, 20 Md. 179; *Antomarchi* v. *Russell*, 63 Ala. 356; *McLaughlin* v. *Cecconi*, 1 New Eng. Rep. 766, 141 Mass. 252; *Ridgway* v. *Vose*, 3 Allen, 180.

Brooks v. *Curtis*, 50 N. Y. 639, is clearly contrary to the law of this Commonwealth.

If plaintiff prefers to obtain the sanction of the court, he presents a proper case for a court of equity to issue a mandatory injunction requiring the defendant to make the removal at his expense, especially when the decree proposed gives the defendant ample time in which to provide for the support of his building on his own land.

Gerrish v. *Shattuck*, 132 Mass. 235; *McLaughlin* v. *Cecconi*, *ubi supra*; *Creely* v. *Bay State Brick Co.* 103 Mass. 514; *Tucker* v. *Foward*, 128 Mass. 361; *Cadigan* v. *Brown*, 120 Mass. 493; *Sanborn* v. *Rice*, 129 Mass. 387.

In *Stevens* v. *Stevens*, 11 Met. 251, defendants were required to remove a dam on plaintiff's land which had been erected and maintained for seven years under a parol license.

In *Nash* v. *New England Mut. L. Ins. Co.* 127 Mass. 91, the defendants were required to remove obstructions in a passageway which had been maintained for ten years.

In *Greene* v. *Canny*, 137 Mass. 64, defendant was required to rebuild a fence which he had improperly removed.

In *Atty-Gen.* v. *Williams*, 1 New Eng. Rep. 369, 140 Mass. 329, the defendant was required, at large expense, to remove bay windows encroaching upon a passageway in violation of the restrictions in a deed from the Commonwealth.

In *Murdock* v. *Prospect Park & C. I. R. Co.* 73 N. Y. 579, the defendant was required to abandon the operation of a road which it had built at large expense, and under parol license, on the plaintiff's land.

See *Cadigan* v. *Brown*, 120 Mass. 493; *Creely* v. *Bay State Brick Co.* 103 Mass. 514; *Stanford* v. *Lyon*, 37 N. J. Eq. 94; *Guttenberger* v. *Woods*, 51 Cal. 523.

In *Liverpool Wharf Co.* v. *Prescott*, 7 Allen, 494, which was a writ of entry, the court held that the plaintiff was not estopped from maintaining the action, although the defendant had built upon the land and had maintained the structure for nearly twenty years under the parol agreement of the plaintiff's agent that the land in question belonged to the defendant.

Brewer v. *Boston & W. R. Corp.* 5 Met. 478; *Proctor* v. *Putnam Machine Co.* 137 Mass. 159.

The doctrine of *Whitney* v. *Union R. Co.* 11 Gray, 359, and of similar cases, has no application.

Messrs. **Edward W. Hutchins** and **James H. Young,** for defendant:

For an injury to his security, a mortgagee may bring an action of trespass on the case, although he be not in possession. The authorities are clear to this point.

1 Jones, Mortg. § 696; *King* v. *Bangs*, 120 Mass. 514.

It is a substantial part of the plaintiff's case in equity that he shall have before the court all the parties who are materially interested in or who will be affected by the decree prayed for.

Story, Eq. Pl. §§ 72, 174.

The objection to the want of a necessary party may be taken at the hearing or by the court itself, or the decree may be reversed for such a defect on a rehearing or on appeal.

Dan. Ch. Pr. 5th Am. ed. *287, 558, *note* 7; Story, Eq. Pl. §§ 75, 543, *note* 3, §§ 541, 236; *Richards* v. *Richards*, 9 Gray, 313; *Hunt* v. *Booth*, 1 Freem. Ch. 215; *Foule* v. *Torrey*, 131 Mass. 289; *Cockburn* v. *Thompson*, 16 Ves. Jr. 325; *Herring* v. *Yoe*, 1 Atk. 290.

The assignee, so far as his interest was concerned, was entitled to try the case upon his answer, in the some manner as if he had appeared in the suit before these decrees were entered.

Blanchard v. *Cooke*, 4 New Eng. Rep. 68, 144 Mass. 207.

Each case is governed by its own circumstances. Whether the time the negligence has subsisted is sufficient to make it effectual is a

question to be resolved by the sound discretion of the court.

Royal Bank v. *Grand Junction R. & D. Co.* 125 Mass. 490, 494; *Brown* v. *Buena Vista Co.* 95 U. S. 157, 160 (24 L. ed. 422, 423).

There was privity of estate between the plaintiff and his grantors; and the user of a grantor is tacked to the user of the grantee to acquire a right by adverse user.

Leonard v. *Leonard*, 7 Allen, 277.

Parties are presumed to contract in reference to the condition of the property at the time of the sale.

Lampman v. *Milks*, 21 N. Y. 505, 507.

In truth, every grant of a thing naturally and necessarily imports a grant of it as it actually exists, unless the contrary is provided for.

Story, *J.*, in *U. S.* v. *Appleton*, 1 Sumn. 492, 502.

While the courts differ in the application of the doctrine of apparent easements and servitudes, the authorities are clear to the point that a purchaser is chargeable with notice of the apparent condition of the property at the time of his purchase.

Ibid.; *Seibert* v. *Levan*, 8 Pa. 383, 391; *Davies* v. *Sear*, L. R. 7 Eq. 427; *Compton* v. *Richards*, 1 Price, 27, 36, 38; *Richards* v. *Rose*, 9 Exch. 218.

Long delay carries with it an imputation of want of reasonable diligence, and throws upon the plaintiff the burden of explaining and excusing his delay.

Royal Bank v. *Grand Junction R. & D. Co.* 125 Mass. 490, 495; *Peabody* v. *Flint*, 6 Allen, 52, 58.

If a party having a right stands by and sees another dealing with the property in a manner inconsistent with that right, and makes no objection while the act is in progress, he cannot afterwards complain.

Kerr, Inj. 2d ed.*19, and *notes*, p. 2, *21, 46; 2 Joyce, Inj. 1264; *Tash* v. *Adams*, 10 Cush. 252; *Fuller* v. *Melrose*, 1 Allen, 166; *Royal Bank* v. *Grand Junction R. & D. Co.* 125 Mass. 490, 494; *Peabody* v. *Flint*, 6 Allen, 52, 57.

Where the defendant has expended moneys in building and the plaintiff takes no steps to assert his rights before the completion of the building, it is invariably held that the plaintiff's equitable right to a removal of the building is forfeited by such delay.

Rochdale Canal Co. v. *King*, 16 Beav. 630, 633; *East India Co.* v. *Vincent*, 2 Atk. 83; *Ramsden* v. *Dyson*, L. R. 1 H. L. 129, 140; *Davies* v. *Sear*, L. R. 7 Eq. 427; *Bankart* v. *Tennant*, L. R. 10 Eq. 141, 147; *Greenhalgh* v. *Manchester & B. R. Co.* 3 Myl. & C. 784, 794; *Wood* v. *Sutcliffe*, 2 Sim. N. S. 163, 169; *Ware* v. *Regent's Canal Co.* 3 De G. & J. *212, 230; *Gaskin* v. *Balls*, L. R. 13 Ch. Div. 324; Kerr, Inj. 1st ed. *42.

If the owner of an easement is guilty of laches in coming to this court for an injunction, the court will not grant an injunction, but will leave him to his remedy at law.

Cooper v. *Hubbuck*, 7 Jur. N. S. 457; *Bankart* v. *Houghton*, 27 Beav. 425.

The equitable remedy is distinct, and is forfeited by delay, even when the remedy at law for damages is allowed.

Scanlan v. *Howe*, 24 N. J. Eq. 273; *Mayer's App.* 73 Pa. 164, 166; *Wason* v. *Sanborn*, 45 N. H. 169; *Senior* v. *Pawson*, L. R. 3 Eq. 330; *Powell* v. *Thomas*, 6 Hare, 300; Kerr, Inj. 2d ed. *46.

The main result of a decree in the plaintiff's favor would be to give him the means of demanding an extortionate price for his permission to allow the wall to remain.

Wood v. *Sutcliffe*, 2 Sim. N. S. 163.

Injunction should also be refused on the ground that the granting of it would inflict serious damage upon the defendant without doing any real practical good to the plaintiff.

Ware v. *Regent's Canal Co.* 3 DeG. & J. 212; *Senior* v. *Pawson*, L. R. 3 Eq. 330; *Wason* v. *Sanborn*, 45 N. H. 169; *Scanlan* v. *Howe*, 24 N. J. Eq. 273.

The wall was an ancient party or division wall between the two estates, like the wall in the case of *Phillips* v. *Bordman*, 4 Allen, 147.

Land which is covered by a party wall remains the several property of the owner of each half, but the title of each is qualified by the easement of the other of support of his building by means of the wall.

Ibid.; *Pierce* v. *Dyer*, 109 Mass. 374–376; *Ingals* v. *Plamondon*, 75 Ill. 118; *Brooks* v. *Curtis*, 50 N. Y. 639; *Hendricks* v. *Stark*, 37 N. Y. 106; *Partridge* v. *Gilbert*, 15 N. Y. 601.

The easement of support is not confined to support of the original building, for if the original building be destroyed a new building may be erected and supported by the same wall. It is not limited to the life of the old wall, but either proprietor may repair it in case of decay, or rebuild it if it is destroyed.

Kent, Com. *437; *Campbell* v. *Mesier*, 4 Johns. Ch. 334; *Partridge* v. *Gilbert*, 15 N. Y. 601; *Eno* v. *Del Vecchio*, 4 Duer, 53.

Either party may strengthen the wall by deepening the foundations.

Standard Bank of British South America v. *Stokes*, L. R. 9 Ch. Div. 68.

The question of the right of an adjoining owner to raise the party-wall has never been passed upon in this State except in the case of *Quinn* v. *Morse*, 130 Mass. 317, where it was held that a purchaser of an adjoining lot, including one half the partition wall, had the right to increase the height of the partition wall.

In the case of *Sanborn* v. *Rice*, 129 Mass. 387, the question did not arise and was not discussed.

McLaughlin v. *Cecconi*, 1 New Eng. Rep. 766, 141 Mass. 252; 3 Kent, Com. 12th ed. *437, 438, *note c.*

An old partition wall from long use, in the absence of evidence, must be deemed a party-wall presumptively, either from an agreement to that effect or from its being built upon the line of the two lots for that purpose by the respective parties.

Schile v. *Brokhahus*, 80 N. Y. 614, 618; *Brown* v. *Werner*, 40 Md. 15; *Brooks* v. *Curtis*, 50 N. Y. 639.

In *Hendricks* v. *Stark*, 37 N. Y. 106, it is held that a party-wall is not a burden, but a valuable appurtenant which passes with the title to the property.

So far as the party making the change can use the wall in the improvement of his own property, without injury to the wall or the adjoining property, there is no good reason why he should not be permitted to do so.

Eno v. *Del Vecchio*, 6 Duer, 17; *Schile* v. *Brokhahus*, 80 N. Y. 614, 618; *Campbell* v. *Mesier*, 4 Johns. Ch. 334; Kent, Com. *487.

It is provided in the statute that its provisions are to be enforced by the inspector of buildings, and it is apparent from its provisions that it was not intended for the benefit of individuals.

Jenks v. *Williams*, 115 Mass. 217; *West* v. *Downman*, L. R. 14 Ch. Div. 111.

W. Allen, *J.*, delivered the opinion of the court:

In the year 1826 the owner of two adjoining city lots built a house upon each lot separated from each other by a brick wall, one half of which was on each lot. The next year he conveyed one of the lots to the plaintiff's grantor, and in 1828 he conveyed the other house to another grantee, under whom the defendant claims. In each deed the boundary line between the houses is described as "a line running longitudinally through the center of the partition wall between the houses," and the same description is contained in the deeds to the plaintiff and to the defendant. The wall remained without change until July or August, 1885. In June, 1885, the defendant Edwards borrowed of the petitioners Ropes and Dexter $20,000 on a mortgage of his estate, for the purpose of building an addition on to his house, and soon after built up the wall so that it was five feet higher than the peak of the wall as it had been, and eighteen feet above the eaves, putting on a flat roof and completing the work September, 1885. November 3, 1886, the plaintiff brought this bill against Edwards alone to have him compelled to remove so much of the addition to the wall as is on the plaintiff's side of the division line, and for damages. After a hearing upon the merits, a decree was entered ordering a removal of the wall, from which the defendant appealed. Subsequently, and after the entry had been made on the docket that the defendant withdrew his appeal, the mortgagees Ropes and Dexter presented a petition praying that the decree might be vacated and that they might be allowed to become parties defendant, and to defend the suit on the merits. At the same time Chipman, who held a second mortgage given by Edwards in September, 1885, filed a similar petition. The petitions were allowed, and the petitioners admitted as defendants and filed answers. The plaintiff appealed. The case was heard upon the merits and reported to the full court.

The mortgagees are directly interested in the subject-matter of the suit. It seeks to diminish the value of their security, and is brought to establish the right of the plaintiff to do so. If the plaintiff removed the wall without right, he would be liable therefor to the mortgagees. *James* v. *Worcester*, 141 Mass. 361, 2 New Eng. Rep. 354, and cases cited.

The bill is brought to establish and exercise for him his right to remove it. It is no answer to say that if the security is impaired it will be in consequence of the wrongful act of the mortgagor with the permission of the mortgagees. The question whether the act was wrongful is a question upon which the mortgagees have a right to be heard. They are immediately interested in resisting the plaintiff's claim and are necessary parties to the suit, and their petitions that the decree should be vacated and they admitted as defendants were properly allowed.

The wall as it stood before it was built upon by Edwards, was a party-wall. It was built and conveyed by the owner of both estates as the partition wall between the houses, and has been used as a party-wall by the several owners of the houses for forty years. No express grant, or agreement, or statute, defines or limits the rights of the parties, and they are such as the law implies to have been the intention of the parties from the grant, expressed or implied from user of the wall as a party-wall, and it is immaterial whether the grant is by the single owner of both estates or is the mutual grant of several owners. See *Webster* v. *Stevens*, 5 Duer, 553; *Richards* v. *Rose*, 9 Exch. 218.

The wall must be taken to have been built as a single structure and granted by the owner or owners of two estates to constitute the wall of the house upon each estate. It was not the dividing line between the two houses because it was a part of each house, and each owner had an equal right in the whole wall with the other owner. The estate which the owners have in it is an estate in a party-wall, and the rights of the owners in it are found in their presumed intention in the mutual grant of a party-wall rather than by classifying it with other estates and deducing its qualities from the name given to it.

The English courts when looking at the common interests and right of the parties,—they call it a tenancy in common,—do not mean that either party can have partition; and the courts of New York, when considering the rights of one owner in the part of the wall on the land of the other owner, —they say that each owns one half in severalty with an easement in the other half,—are not prevented from deciding in the same case that each can take down and rebuild the half of the other (*Partridge* v. *Gilbert*, 15 N. Y 601), nor from deciding that the easement is not an incumbrance upon either estate, but a benefit to each. *Hendricks* v. *Stark*, 37 N. Y. 106. See *Bertram* v. *Curtis*, 31 Iowa, 46.

We are not considering the frequent cases where the rights of the parties are defined by special terms or agreements, but the simple grant, express or implied, of a party-wall; and this is a grant by the owner of both estates or the mutual grant of the separate owners, of rights in a wall situated on both estates. What these rights are depends upon the presumed intention of the parties. The question involved in this case is whether such a grant is limited as to the height of the wall to a particular wall, or to the wall which shall first be built under it, or whether it gives to either party a right to build higher an established wall for the purpose of putting an addition upon his house. It is assumed that this will be done without impairing the integrity or stability of the existing wall.

The purpose of each of the adjoining owners in providing for a party-wall is the same. It is intended to form part of a building on his land. A party-wall is as beneficial to him as a several wall, and it is no detriment to him, for the use which one owner makes of it as a wall

of his building cannot impair the use of the other. In effect, each owner acquires the right to build one half of his wall upon his neighbor's land, and each, contributing his portion of the expense, has a right to an equal benefit in a wall so built. The wall is a substitute to each for a separate wall, and there can be no implied limitation in his right to use it as he would use his several wall, except that he shall not impair its value to his neighbor. With this limitation, it will be presumed that each intended it for all uses and purposes to which the wall of his building would ordinarily and properly be put. That presumption is for the advantage of both and to the detriment of neither. If the party-wall cannot be built up, neither house can be raised without building a new wall, for if one owner could lawfully build a several wall upon the part of the wall over his own land, it would not be a right of practical value. He could not build on it a sufficient wall. It is not reasonable to suppose that each party intended that he should never use the wall for a building higher than the one that should be first erected, and a provision to that effect detrimental to both parties and beneficial to neither cannot be presumed. If it is said that one owner may not wish to use the wall as built up, and may prefer not to have the adjoining building higher than his own, the answer is that that is a particular and exceptional circumstance, which cannot be presumed. It is presumed to be a detriment to the owner of a building to deprive him of the power to make additions to it, and grants and contracts will be construed on that presumption unless it is controlled by their terms.

Not only would a provision, implied in a grant of a party-wall, that it should not be carried higher than as originally constructed, be contrary to the interests and the apparent intention of the parties, but it would not be in accordance with public policy. The public interest is not promoted by putting impediments in the way of erecting buildings, and the law will not be swift to construe the acts of parties so as to produce that effect.

We have been referred to very few authorities upon the subject, and the question of the right of one owner of a party-wall to build it up seems to have been very seldom raised.

Phillips v. *Bordman*, 4 Allen, 147, discusses the right in a party-wall as an easement, and there is certainly nothing in the case unfavorable to the right to build upon the wall.

Sanborn v. *Rice*, 129 Mass. 387, was tort for breaking and entering the plaintiff's close by building up the partition wall between the houses of the plaintiff and defendant, and the action was sustained, but the only question considered in the opinion was whether there was any evidence that the plaintiff owned to the middle of the wall.

It is said of that case in *Quinn* v. *Morse*, 130 Mass. 317, 322, that "so much of the wall as was carried up by the defendant on the plaintiff's land was not as wide as the original wall, nor was its face towards the plaintiff's land parallel with the centre line of that wall, and the defendant did not rely on any right to carry up a party-wall upon the plaintiff's land, but on the plaintiff's want of title in the land itself."

Quinn v. *Morse*, *supra*, was a bill in equity to restrain the defendant from building up a partition wall between him and the plaintiff. The plaintiff had conveyed the estate to defendant's boundary on the middle of the partition wall. This sale was in pursuance of an agreement by which the defendant agreed to pay to the plaintiff for half of the wall what it was worth to the defendant for building a store on the land. The court says that the intention of the plaintiff that the wall should be a party-wall, which the defendant would have a right to carry up in building his store, was manifested by the agreement. The agreement was only to sell one half of the wall for what it should be worth in building a store. The right to carry up the wall seems to have been inferred from the intention in the agreement that it should be a party-wall.

In *McLaughlin* v. *Cecconi*, 141 Mass. 252, 1 New Eng. Rep. 766, the whole wall was on the plaintiff's land and belonged to him, and no question in regard to party-walls arose.

Brooks v. *Curtis*, 50 N. Y. 639, is directly in point and decides that one owner of a party-wall has a right to build it up.

In *Partridge* v. *Gilbert*, *supra*, in which it was decided that one owner had a right to take down and rebuild a ruinous party-wall, the wall was rebuilt higher than before, and the party rebuilding was held not liable.

It seems well settled that one owner of a party-wall has a right to take down and rebuild it when ruinous.

In *Campbell* v. *Mesier*, 4 Johns. Ch. 334, *Chancellor* Kent decided that one owner of a party-wall who had rebuilt it could recover contribution from the other owner.

In *Standard Bank* v. *Stokes*, L. R. 9 Ch. Div. 68, it was said that one owner of a party-wall, where the Metropolitan Building Act did not apply, had a right to lower the foundation so as to give him a sub-basement.

In *Field* v. *Leiter*, 6 West. Rep. 54, 118 Ill. 17, the wall was built by the plaintiff, one half on adjoining land. Defendant bought the adjoining land and an agreement was made between the parties, by which the defendant might use the wall as a party-wall for his store, ten stories high, with the right to add to the height of it, the defendant agreeing to straighten the wall and foundations by necessary additions thereto on his own side. It was held that defendant had a right to make necessary additions to the foundation on the plaintiff's side.

Eno v. *Del Vecchio*, 4 Duer, 53, decided that one owner might underpin and deepen the foundation, and raise the wall higher on his own land.

Matts v. *Hawkins*, 5 Taunt. 20, has been cited as deciding that one owner of a party-wall can lawfully take down an addition built upon it by the other owner. But this is expressly decided under the Building Act, 14 Geo. III. chap. 78, which regulated the rights of owners.

We have seen nothing in the English cases, such as *Cubitt* v. *Porter*, 8 Barn. & C. 257; *Wiltshire* v. *Sidford*, 1 Man. & Ry. 404; *Stedman* v. *Smith*, 8 El. & Bl. 1, and *Watson* v. *Gray*, L. R. 14 Ch. Div. 192, in which owners of a party-wall are called tenants in common, and which decide that tenancy in a party-wall

has some of the qualities of tenancy in common, which suggests that one owner of a party-wall for the lateral support of buildings can have partition of the wall, or cannot carry it up higher than it may originally be built, for the purpose of using it as the wall of his building.

The limitation upon the right of each owner to use the wall as the lateral wall of such house as he may desire to erect is that he shall not impair the value of the wall to the other owner. If one owner carries up the wall, the addition becomes part of the party-wall and the owners have equal rights in it, and the value of the wall to either owner cannot be thereby impaired, but neither owner has a right to so use the wall as to weaken or injure it. *Phillips* v. *Bordman*, *supra*.

The judge who heard the case found that the wall was not insecure and did not render the plaintiff's house insecure; and it does not appear that in any particular the new erection impairs the value of the old wall to the plaintiff.

The plaintiff claims that he can take advantage in this suit of the violation by defendant of Stat. 1885, chap. 374, and of ordinances of the City of Boston, by building up the wall without a permit from the inspector of buildings, and by making the wall of less thickness than required by the statute and ordinance. But these were not intended, as was the English statute before referred to, to regulate the rights of the parties between themselves, but for the public protection and security. The statute prescribes penalties for its violation and provides for its enforcement by proceedings in equity by the inspectors of buildings. We do not think that the plaintiff can maintain any suit against the defendant merely on the ground that the wall was erected contrary to the provisions of the statute or of the ordinance. He must at least show some damage or detriment to himself in consequence. None is shown. The old wall cannot be affected by the statute. The fact that the new erection is a party-wall does not expose the plaintiff to the animadversion of the law or to any detriment in respect of the wall. The worst that could happen to him would be that it should be taken down.

We think that, as between the owners, Edwards had a right to carry up the wall, leaving the old part of the wall intact and secure. If the manner in which he did this was in violation of the statute, that fact does not give to the plaintiff the right to have the wall taken down.

Bill dismissed

OREGON SUPREME COURT.

W. H. BIGGS, Railroad Commissioner of the State of Oregon, *Appt.*,
v.
George W. McBRIDE, Secretary of State of the State of Oregon, *Respt.*

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

1. **In Oregon an Act which passes the Legislature, and contains an emergency clause,** followed by the words "that the same shall take effect and be in force from and after its approval by the governor," but which the governor never approves, but vetoes, and the same is then duly passed by both Houses by the necessary majorities, notwithstanding the veto, takes effect and is in force from and after its passage.

2. **Such Act takes effect** when the law-making power has done every act or thing necessary under the Constitution to its complete enactment as a law.

3. **Under the Oregon Constitution, which vests in the Legislature the power** to declare in the body or preamble of an Act the emergencies by which it may be put in force in less than ninety days from the end of the session, when the emergency is specified in the Act, the same is conclusive upon the courts, and is not reviewable.

4. Such Constitution vests in the governor the chief executive power of the State (§ 1, art. 5), but this does not include the power to fill vacancies in office.

5. **Where the Legislature has exercised the power of appointment** to offices created by it since the adoption of the Constitution, and such exercise has been acquiesced in by every department of the government, and has never been questioned, it is a contemporaneous construction which is of great weight.

6. **Removal for cause, of an officer,** must be upon notice to him of the charges, and an opportunity must be given to him to be heard in his defense. Whether the power of removal may be vested in the governor, or is, in its nature, executive, or is judicial, so that it cannot be vested in him, is not decided.

7. **Mandamus is not the proper proceeding** by which to try title to an office.

(June 20, 1889.)

APPEAL by petitioner from a judgment of the Circuit Court of Marion County denying his petition in a proceeding by mandamus brought to compel respondent to audit the claim of petitioner for salary as state railroad commissioner. *Affirmed.*

The facts are stated in the opinion.

Messrs. **N. B. Knight, J. J. Murphy** and **P. H. D'Arcy,** for appellant:

There is no emergency declared in the law within the meaning of section 28, article 4, of the Constitution, which reads as follows: "No Act shall take effect until ninety days from the end of the session at which the same shall have been passed, except in case of emergency, which emergency shall be declared in the preamble or in the body of the law."

McWhirter v. *Brainard*, 5 Or. 426; ***Cain* v.**

NOTE.—Nature of the process of mandamus. See State v. Whitesides (S. C.) 3 L. R. A. 777, *note*.

To public officer, application for. See U. S. v. Hall (D. C.) 1 L. R. A. 738, *note*.

Issuance to executive officer of State. See State v. Whitesides, *supra*.

See also 8 L. R. A. 188; 14 L. R. A. 643.

Goda, 84 Ind. 209; *Hendrickson* v. *Hendrickson*, 7 Ind. 13.

When this law was passed there was no time fixed in the preamble or body of the law when it should take effect, and consequently it went into effect under the Constitution.

Wheeler v. *Chubbuck*, 16 Ill. 361; *Iroquois Co.* v. *Keady*, 34 Ill. 293; *Scott* v. *Clark*, 1 Iowa, 70; *Hunt* v. *Murray*, 17 Iowa, 313; *Welch* v. *Battern*, 47 Iowa, 147; *Cain* v. *Goda*, 84 Ind. 209; *State* v. *Little Rock, M. R. & T. R. Co.* 31 Ark. 711; *People* v. *Johnston*, 6 Cal. 673; *Santa Cruz Water Co.* v. *Kron*, 74 Cal. 223; *Rice* v. *Ruddiman*, 10 Mich. 125; *McClure* v. *Oxford Twp.* 94 U. S. 429 (24 L. ed. 129).

Constitutional provisions are absolutely mandatory and can in no case be regarded as directory merely, to be obeyed or not within the discretion of either or all of the departments of the government.

Hunt v. *State*, 22 Tex. App. 396; *Smithee* v. *Garth*, 33 Ark. 1; *Re Richardson*, 2 Story, 576.

The Legislature must be intended to mean what it has plainly expressed, and consequently there is no room for construction.

Newell v. *People*, 7 N. Y. 97, 98; *Koch* v. *Bridges*, 45 Miss. 247; Endlich, Interpretation of Statutes, §§ 4, 8, and authorities cited.

The approval by the governor of an Act passed by the Legislature means and is evidenced by his signature upon the bill.

Const. art. 5, § 15; *People* v. *Bowen*, 21 N. Y. 526; *State* v. *Coahoma Co.* 64 Miss. 358.

The taking effect of the law itself may be made to depend upon the happening of some future event.

Lothrop v. *Stedman*, 42 Conn. 593, 594; *Barto* v. *Himrod*, 8 N. Y. 483.

The appointment to office is peculiarly an executive, not a legislative, power.

Const. art. 3, § 1, art. 5, § 16; *Taylor* v. *Com.* 3 J. J. Marsh. 404.

An office created by the Legislature is vacant until filled by appointment.

Cline v. *Greenwood*, 10 Or. 230.

In *Iroquois Co.* v. *Keady*, 34 Ill. 293, the Legislature passed a law for the removal of the county seat. The court held that in order that a law shall take effect before the expiration of sixty days after the end of the legislative session, the Legislature must so direct.

If the General Assembly shall deem any law of immediate importance, they may provide that the same shall take effect by publication in newspapers in this State.

Iowa Const. art. 3, § 26; *Hunt* v. *Murray*, 17 Iowa, 313.

The Act itself expressly fixes the time when the same is to take effect.

In *Welch* v. *Battern*, 47 Iowa, 147, the Legislature provided that an Act should take effect from its publication in two designated papers. It was held by the court that it would not take effect earlier than the constitutional period, by its publication in one of the newspapers.

No Act shall take effect until the same shall have been published and circulated in the several counties of this State by authority, except in case of emergency, which emergency shall be declared in the preamble or in the body of the law.

Ind. Const. art. 4, § 28.

In *Hendrickson* v. *Hendrickson*, 7 Ind. 13, it was held that the declaration of emergency cannot be taken by implication, but must be expressly declared.

In *Cain* v. *Goda*, 84 Ind. 209, it was held that a statute, without an emergency declared therein, does not take effect until published as required by the Constitution.

No public Act shall take effect or be in force until the expiration of ninety days from the end of the session at which the same passed, unless the Legislature shall otherwise direct, by a two-thirds vote of the members elected to each House.

Mich. Const. art. 4, § 20.

The Act not being ordered to take immediate effect, it went into effect under the Constitution, ninety days after the end of the session at which it was passed.

Rice v. *Ruddiman*, 10 Mich. 125.

No public Act shall take effect or be in force until ninety days from the expiration of the session at which the same was passed, unless it is otherwise provided in the Act.

Ark. Const. art. 5, § 22.

California Pol. Code, § 323, reads as follows: "Every statute, unless a different time is prescribed therein, takes effect on the sixtieth day after its passage."

Santa Cruz Water Co. v. *Kron*, 74 Cal. 223; *People* v. *Johnston*, 6 Cal. 673.

Where the journal of the Senate failed to disclose the signing by the presiding officer of each House of all bills and joint resolutions passed by the Legislature, after their titles have been publicly read before signing, in open session, it was held that the Act was unconstitutional.

Hunt v. *State*, 22 Tex. App. 396; Tex. Const. art. 3, § 38.

The Constitution of Arkansas, 1868, provided that "on the final passage of all bills, the vote shall be taken by yeas and nays, and entered on the journal." It was held that the failure to enter the names of those voting in the negative was a disregard of the constitutional requirement and the bill did not become a law.

Smithee v. *Garth*, 33 Ark. 1.

In prescribing the manner of the election or appointment of officers in this State the Legislature is expressly limited by the Constitution to county, township, precinct and city officers.

Const. art. 6, § 7.

In prescribing the manner of filling vacancies the Legislature is expressly limited to vacancies in county, township, precinct and city officers.

Const. art. 6, § 9.

When the selection of an officer is referred to the governor or other functionary, it is called an appointment, and when referred to the people or to an organized body, it is called an election.

Speed v. *Crawford*, 3 Met. (Ky.) 211.

All commissions to state officers must bear the signature of the governor.

Const. art. 5, § 18.

The office of railroad commissioner is a state office, and all state offices must be filled either by election by the people or by appointment by the governor.

See constitutional provisions above cited; *State* v. *Kennon*, 7 Ohio St. 559, 560.

Nomination to office is an executive function. By leaving nominations in the proper place—among executive functions—the principle of

the distribution of power is preserved, and responsibility weighs with its heaviest force upon a single head.

Atty-Gen. v. *Brown*, 1 Wis. 513.

Messrs. **R. Williams, George H. Bennett and Joseph Simon,** for respondent:

Removals from office by the governor at discretion and without cause are contrary to the policy of law.

People v. *Lord*, 9 Mich. 232; *People* v. *Ingham Co. Treas.* 36 Mich. 419.

The governor's power of removal can only be exercised upon charges which shall specify the particular acts or neglect relied on to make out the cause alleged; and the officer sought to be removed must have notice of these charges and specific allegations, and reasonable notice for a hearing thereon, upon which he may produce proofs.

Dullam v. *Willson*, 53 Mich. 393.

The Legislature ascertains in its own way the facts on which it bases its action, and it is made the sole judge whether facts exist to authorize the immediate passage of a bill; and whatever facts or reasons it may give for such action must be held sufficient.

Day Land & Cattle Co. v. *State*, 68 Tex. 526.

The governor in the exercise of the veto power acts, not as the executive, but as a component part of the Legislature, and an Act is passed and becomes a law upon his approval, or in default of that, upon its passage over his veto.

Logan v. *State*, 3 Heisk. 442.

Whether it receive the signature of the governor, or remains in his hands for ten days, or being vetoed is carried by two thirds of both Houses, its passage is dated from the time it ceased to be a mere proposition or bill, and passed into a law.

Wartman v. *Phila.* 33 Pa. 202.

Although the Act may not expressly state when it is to take effect, or that it is to take effect at once, yet the result may be reached constructively; and if that appears to be the intention of the Legislature, even impliedly, the law will take effect at once.

Standeford v. *Wingate*, 2 Duv. (Ky.) 440; *Swann* v. *Buck*, 40 Miss. 268; *People* v. *Lacombe*, 99 N. Y. 43.

A strict and literal interpretation of a statute is not always to be adhered to.

Sedgw. Construction of Statutes, pp. 66, 67, *note a*; Endlich, Interpretation of Statutes, §§ 421, 375.

An office of legislative creation can be modified, controlled or abolished by the same power, and the mode of appointment thereto can be changed by vesting the same in the Legislature.

Davis v. *State*, 7 Md. 151, 61 Am. Dec. 331; *People* v. *Osborne*, 7 Colo. 605.

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

This proceeding was instituted by the plaintiff, claiming to be one of the railroad commissioners of the State, against the Secretary of State, to compel him by a writ of mandamus to draw a warrant upon the state treasury for the sum of $277.77, being the amount claimed as plaintiff's salary up to the date of the filing of the petition for the writ. The petition alleges, in substance, that George W. McBride is the duly elected, qualified, and acting Secretary of State of the State of Oregon, and is, by virtue of said office, the auditor of public accounts; that your petitioner is one of the duly appointed, qualified, and acting railroad commissioners of the State of Oregon, constituting one of the members of the board of said railroad commissioners of said State, and has been such since the 21st day of February, 1889, at which time the appellant was duly appointed said railroad commissioner by Hon. S. Pennoyer, Governor of the State of Oregon, in pursuance of a law duly enacted and passed at the fourteenth regular session of the Legislative Assembly of said State, and which was approved the 18th of February, 1887; that, as such railroad commissioner, your petitioner, on the 31st day of March, 1889, became entitled to receive for his services as such officer the sum of $277.77, in United States gold coin, for the quarter ending March 31, 1889; that on the 1st day of April, 1889, your petitioner applied to said defendant at his office in the City of Salem, and requested and demanded that the defendant, as such Secretary of State and auditor of public accounts, should audit, allow, and issue his warrant upon the treasurer of the State for the payment of said $277.77, but that the defendant refused and neglected, and still does refuse and neglect, without lawful right or excuse, to either audit, allow, or issue his warrant upon said treasurer, for the payment of said claim, or any part thereof; that your petitioner has no plain, speedy, or adequate remedy at law for the recovery of said sum of $277.77, which became justly due and owing to the plaintiff on the 31st day of March, 1889. Prayer that the writ of mandamus be awarded, etc.

The defendant demurred to the writ, upon the ground that the same did not state facts sufficient to entitle the plaintiff to the relief prayed for, or to any relief, which demurrer was sustained, and the writ dismissed, from which judgment this appeal was taken.

The appellant's notice of appeal specifies, in substance, the following grounds of error upon which he intends to rely upon the appeal: (1) The court erred in sustaining the defendant's demurrer. (2) The court erred in denying the writ of mandamus prayed for in said cause. (3) The court erred in dismissing plaintiff's cause at his costs.

The board of railroad commissioners in this State was created by the Act of the Legislative Assembly approved February 18, 1887. This Act, among other things, provided that such board should consist of two persons, to be appointed by the Governor from each of the two political parties, who should hold their offices for and during the term of four years, or until their successors are appointed, as in said Act provided; and, if a vacancy occurs by resignation, death, or otherwise, the governor, in the manner thereinafter provided, was to appoint a commissioner to fill such vacancy for the residue of the term, and might in the same manner remove any commissioner, for cause. During the session of the Legislative Assembly next preceding the expiration of the term of office of the commissioners first appointed by this Act, and every four years thereafter, it

was made the duty of the governor, by and with the advice and consent of the Senate, to appoint the successors of such commissioners, who should, in like manner, serve for four years.

It was further provided that said commissioners should be selected, one from the political party that cast the highest number of votes at the last general election, in this State, preceding his appointment, and one from the political party casting the next highest number of votes at said election. Pursuant to this Act, a board of commissioners was appointed by the governor, who continued to serve until the 16th day of January, 1889, on which day the governor made an executive order removing them, for cause.

On the 12th day of February, 1889, the Legislative Assembly passed an Act amendatory of the existing law on the subject of railroad commissioners, whereby the board was increased to three persons, and provision was made for choosing said commissioners biennially by the Legislative Assembly, and they were to hold office for the term of two years, and until their successors were elected and qualified. The following emergency clause was added at the end of the bill:

"Sec. 5. Inasmuch as the amendments herein proposed would greatly tend to benefit the people of this State, and there is urgent necessity therefor, this Act shall take effect and be in force from and after its approval by the governor."

The Act was vetoed by the governor on the 19th day of February, 1889. On the same day it passed the Senate, notwithstanding the veto of the governor, by the requisite majority; and on the 20th day of the same month it passed the house by a like majority, and was deposited in the office of the Secretary of State.

On this statement three questions have been argued before us, and presented for our determination: *First*. The event on which the last-named Act was to take effect never happened. This left the first Act in force, under which the governor might lawfully appoint. *Second*. The amendatory Act contains no emergency clause. It did not therefore go into effect until ninety days after the adjournment of the Legislature. This view would also leave the first Act in force during the ninety days, and the governor might exercise the power of appointment during that time. *Third*. But, conceding that neither of the objections is well taken, and that the amendatory Act took effect on the 20th day of February, 1889, still the Legislative Assembly could not exercise the power of appointment. That is an executive Act, and belongs exclusively to the governor, under the Constitution. These questions will be examined in their order..

1. The point of contention presented by the first question arises out of the language used in section 5 of the amendatory Act, to the effect that the same should take effect and be in force from and after its approval by the governor. It is contended by the appellant that, by the terms of the Act itself, it was only to be in force from and after its approval as aforesaid; and, if the governor failed to approve it, it could only take effect at the end of ninety days after the adjournment of the session. But it seems to me this argument proves too much. If the words "from and after its approval by the governor" are to be treated as a condition precedent, as the contention assumes, then it could never take effect, for the reason that the condition had never happened. But this method of treating a grave constitutional question seems scarcely satisfactory. It seems more like a quibble over words than an attempt to ascertain what the Legislature really meant by the use of the phraseology in question. I think there can be no doubt that the Legislature used the language in question in the same sense it used the words "from and after its passage." Wherever an emergency clause was added to a bill, one of these forms of expression seems to have been used; and, manifestly, they are used to convey the same meaning.

Turning to the Session Acts of 1889, on page 1, the form of expression used is, "shall take effect immediately upon its approval by the governor." On page 4 the form used is, "shall take effect and be in force from and after its approval by the governor." On the same page is another Act, and the form of expression is, "shall take effect and be in force from and after its passage." On page 6 the form is, "shall be in force from and after its approval by the governor." On page 7 the same form of expression is used. On page 9 is the Act regulating the sale of spirituous liquors in this State, and the same form is observed. The governor did not approve this Act, nor did he, within five days after it was presented to him (Sundays excepted), return it to the house in which it originated, with his objections, but filed it with the Secretary of State.

But it is useless to follow these forms of expression throughout the volume containing the laws enacted by the Legislature of 1889. Every Act containing an emergency clause concludes with one or the other of these forms of expression, with an occasional slight variation that does not affect the sense. A careful review of all of these Acts, including the one under consideration, leads us to the conclusion that these are equivalent expressions, and that they mean that the several Acts in which they are used shall take effect and be in force from and after their passage,—that is, from and after the time when the law-making power shall have done every Act necessary under the Constitution to their complete enactment as laws. This is the clear legislative intent, and by that we must be guided in construing every statute, unless some principle of the Constitution is invaded. The following cases sufficiently indicate the power of the Legislature, and in what manner it is exercised in putting enactments into force. *Re Welman*, 20 Vt. 653; *Hamlet* v. *Taylor*, 5 Jones, L. 36; *Tarlton* v. *Peggs*, 18 Ind. 24; *Goodsell* v. *Boynton*, 2 Ill. 555; *State* v. *Click*, 2 Ala. 26; *Re Richardson*, 3 Story, 571; *People* v. *Clark*, 1 Cal. 406; *Baker* v. *Compton*, 52 Tex. 252; *Logan* v. *State*, 3 Heisk. 442; *The Ann*, 1 Gall. 62; *Rathbone* v. *Bradford*, 1 Ala. 312; *Smets* v. *Weathersbee*, R. M. Charlt. (Ga.) 537.

2. Article 4, § 28, of the Constitution provides: "No Act shall take effect until ninety days from the end of the session at which the same shall have been passed, except in case of

emergency; which emergency shall be declared in the preamble, or in the body of the law."

It is contended by the appellant that there is no emergency declared in the body of this law, and that, therefore, the Act did not take effect until ninety days after the adjournment of the Legislature. In the absence of a constitutional or statutory rule upon the subject, all statutes would take effect from the first day of the session at which they are passed; at least, that is the common-law rule. Cooley, Const. Lim. *156.

But the Constitution of this State has prescribed the rule by which every department of the government is bound; and the only duty the court has to perform is to determine whether or not it has been complied with in this particular case. The emergency is declared in these words: "Inasmuch as the amendments herein proposed would greatly tend to benefit the people of this State, and there is urgent necessity therefor," etc. I do not think that the latter member of the sentence adds anything to the first. It declares no emergency. It is the fact of the existence of any event or occasional combination of circumstances, which calls for immediate action or remedy, or the fact that some pressing necessity or exigency exists which enables the Legislature, by declaring the same in the preamble or body of the Act, to put the same in force sooner than the time prescribed in the Constitution in cases where there is no such emergency, or the same is not so declared; but, in all such cases it is for the Legislature to ascertain and declare the fact of the existence of the emergency, and their determination is not reviewable elsewhere. The Constitution has vested the law-making department of the government with the power to determine that question (*Carpenter* v. *Montgomery*, 7 Blackf. 415; *Gentile* v. *State*, 29 Ind. 409); and such determination is not made reviewable in the courts. No doubt the emergency must be declared in the body or preamble of the Act; but, if there is no fact, event or state or condition of affairs mentioned which the Legislature determines creates an emergency, no difference how strongly or directly it may be asserted in the Act that it is necessary that it should go into effect immediately, the legislative declaration must fail, for the reason the Constitution is not complied with.

By the Act under consideration, it is declared that the amendments proposed therein "would greatly tend to benefit the people of this State." "Benefit to the people" is the object and purpose of all government; and, where the result is manifest, no doubt the Legislature ought to resort to unusual, and even extraordinary, ends to attain it. It is true, in this case, we may be unable to perceive in what manner the proposed benefit is to accrue; but, the Legislature having declared that the people will be benefited, we must assume that such determination is proper, and, so far as the court is concerned, final. Such determination is in its nature political, and not judicial; and for such errors, if they be errors, the remedy must be found in the virtue and intelligence of the people. The ballot-box is the medium through which they may be corrected.

3. The third question remains to be considered. It has been argued, in effect, on the part of the appellant, that, under the Constitution of this State, the Legislature cannot create a new office,—one not provided for by the Constitution,—and fill it by an election in joint convention of the two Houses; that, while it is competent for the Legislature to create such additional offices as the public necessities may require, still, when created, if an election by the people is not provided for, the right to fill the same by appointment is devolved upon the governor by the Constitution. In other words, that the right to fill a vacant office belongs to the executive as one of the duties pertaining to his office, and that the assumption on the part of the Legislature to fill the office of railroad commissioners by persons of their own selection is an usurpation, by that department of government, of powers that are vested by the Constitution in the executive.

By art. 3, § 1, of the Constitution, it is provided: "The powers of the government shall be divided into three separate departments,—the legislative, the executive, including the administrative, and the judicial; and no person charged with official duties under one of these departments shall exercise any of the functions of another, except as in this Constitution expressly provided." For most practical purposes the line of demarcation which separates the three departments of government, the one from the other, is obvious enough; and there is but little probability that one department will assume to exercise functions which properly belong to one of the others. It is only where the power in question lies near the border line that any serious question can arise, and then it must be determined on its own particular facts.

In *Wynehamer* v. *People*, 13 N. Y. 391, the court of appeals pointed out the difficulty of attempting any general definition of this distribution of powers. Speaking through Comstock, J., the court said: "I entertain no doubt that, aside from the special limitations of the Constitution, the Legislature cannot exercise powers which are in their nature essentially judicial or executive. They are, by the Constitution, distributed to other departments of the government. It is only the 'legislative power' which is vested in the Senate and Assembly; but, where the Constitution is silent, and there is no clear usurpation of the powers distributed to other departments, I think there would be great difficulty and great danger in attempting to define the limits of this power. *Chief Justice* Marshall said: 'How far the power of giving the law may involve every other power, in cases where the Constitution is silent, never has been, and perhaps never can be, definitely stated.' That very eminent judge felt the difficulty; but the danger was less apparent then than it is now, when theories, alleged to be founded in natural reason or inalienable rights, but subversive of the just and necessary powers of government, attract the belief of considerable classes of men, and when too much reverence for government and law is certainly among the least of the perils to which our in-

stitutions are exposed. I am reluctant to enter upon this field of inquiry, satisfied, as I am, that no rule can be laid down in terms which may not contain the germ of great mischief to society, by giving to private opinion and speculation a license to oppose themselves to the just and legitimate powers of government."

It was not claimed at the argument that there is any express provision of the Constitution which authorized the governor in direct terms to make the appointment in question, but that it is included in the grant contained in § 1, art. 5, of the Constitution. That section declares: "The chief executive power of the State shall be vested in a governor," etc.

Now, if it could be shown that the power to appoint all officers which are not expressly made elective by the people is a part of "the chief executive power of the State," the appellant's contention would be sustained; but no authority whatever has been cited to sustain this view, nor is it believed that any exists; on the contrary, the provisions of the fifth article of the Constitution, which relates to the executive department, all seem at variance with this view. The framers of this instrument evidently designed that no prerogative powers should be left lurking in any of its provisions. No doubt they remembered something of the history of the conflicts with prerogative in that country from which we inherited the common law. They therefore defined the powers of the chief executive of the State so clearly and distinctly that there ought to be no controversy concerning the method of filling the same, or, in some cases, of changing the method of filling an existing office. In 1870 the Legislature, by an Act, created a vacancy in the office of clerk of this court, and provided for filling the same by an election in joint convention of the two Houses. Acts 1870, p. 58.

A clerk was elected under this Act by the Legislature, and served by virtue of such election until the law was repealed, and the power to appoint vested in the court. The librarian has always been selected by the Legislature since the office was created, and so have the pilot and fish commissioners, and, when the office of state geologist was created, the Legislature named the officer in the body of the Act. Acts 1872, p. 105.

The power exercised by the Legislature in the appointment of some of these officers is almost coeval with the Constitution. The power thus exercised has never been called in question, but has been acquiesced in by every department of the government, and is, in itself, a contemporaneous construction of the Constitution which, if the question were doubtful, might be sufficient to turn the scale in its favor. Under any view, such construction is entitled to great weight, and could not be lightly regarded.

4. Thus far, nothing has been said on the subject of the power of the governor to remove the railroad commissioners. The Act under which they were appointed provided that he might remove them for cause. This clearly implied that they could not be removed at the mere will of the governor, or without cause. Whether such a power is so far judicial in its nature that it cannot constitutionally be vested in the chief executive, as many authorities hold (*Page* v. *Hardin*, 8 B. Mon. 648; *Curry* v. *Stewart*, 8 Bush, 560; *Hyde* v. *State*, 52 Miss. 665; *State* v. *Pritchard*, 36 N. J. L. 101; *Honey* v. *Graham*, 39 Tex. 1; *Dullam* v. *Willson*, 53 Mich. 392), or whether it is in its nature executive, and therefore properly belongs to the governor, we do not at this time undertake to determine. But it is believed, under either view, and by whomsoever the power of removal for cause may be exercised, it must be done upon notice to the delinquent of the particular charges against him, and an opportunity be given him to be heard in his defense. *Dullam* v. *Willson, supra; State* v. *Hawkins*, 44 Ohio St. 98, 3 West. Rep. 125; *People* v. *N. Y. Fire Comrs.* 72 N. Y. 445; *People* v. *New York*, 19 Hun 441.

But we do not decide this question now, and we only refer to it to avoid misconception.

5. There is another question, I think, proper to mention for the same reason. The ostensible object of this proceeding is to obtain payment from the state treasury of the salary plaintiff claims as railroad commissioner, but we cannot shut our eyes to the fact that its real object is to try the plaintiff's title to that office, and that is the question discussed; but no objection was made by the respondent, and, on account of the public importance of the questions involved, we deem it best to indicate an opinion on them. The better view is that this is not the proper proceeding to try the title to an office. High, Extr. Legal Rem. § 49; Moses, Mand. 150; *People* v. *Olds*, 3 Cal. 167; *Meredith* v. *Sacramento Co.* 50 Cal. 433; *Warner* v. *Myers*, 4 Or. 72; *People* v. *New York*, 3 Johns. Cas. 79; *People* v. *Stevens*, 5 Hill, 616; *Re Gardner*, 68 N. Y. 467; *State* v. *Moseley*, 34 Mo. 375; *State* v. *Thompson*, 36 Mo. 70; *People* v. *Detroit*, 18 Mich. 338.

Something was said at the argument in relation to a stipulation that this question should not be insisted upon by the respondent. The stipulation does not appear of record, and, if it did, it would not affect the result. Such a stipulation would be contrary to law, and could not be enforced. The law has fixed the extent and uses to which the writ of mandamus may be applied, and the stipulation or agreement of the parties can neither enlarge nor lessen the same.

The judgment of the court below must therefore be affirmed.

A petition for a rehearing was denied in this case July 1, 1889.

GEORGIA SUPREME COURT.

TAYLOR *et al., Plf's. in Err.,*
v.
STREET.

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

A grantor in a deed of land, who has placed the deed upon record, and his heirs, claiming under him, are estopped from setting up title to the land on the ground of nondelivery of the deed, as against one who has purchased the land from the grantee without notice, and in good faith.

(May 13, 1889.)

ERROR to the Superior Court of Dade County, to review a judgment in favor of defendant in an action of ejectment. *Affirmed.*

The case is stated in the opinion.

Messrs. **Graham & Graham** for plaintiffs in error.

Messrs. **R. J. McCamy** and **Lumpkin & Brock** for defendant in error.

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

Emma McCord and Willie Taylor, as heirs at law of C. C. R. Taylor, brought ejectment against Street for a certain tract of land. The evidence will be found in the official report. On the trial of the case, under the evidence and charge of the court, the jury returned a verdict for the defendant. A motion was made for a new trial, based principally upon alleged errors in the charge of the court to the jury, which motion was overruled by the court, and the plaintiffs excepted. Whatever errors may have been committed by the court in the charge to the jury, we think the verdict was right and should not be set aside.

The evidence shows that C. C. R. Taylor, under whom the plaintiffs claim, sold this land to his father, and made and executed a deed therefor to his father; and that Taylor, the son, had the same recorded in the clerk's office according to law. The son lived several years after this deed was recorded. After his death the father went into possession of the land, occupied it, and exercised acts of ownership over it for years, when he sold it to Street, the defendant. Street purchased without notice of any claim of the plaintiffs to the land. If C. C. R. Taylor, under whom these plaintiffs claim, were alive, and had brought this suit, under the facts of this case he would be estopped from setting up title to this land. These plaintiffs, claiming under him, are likewise estopped.

Whether the deed was ever actually delivered or not, the plaintiffs' intestate had it placed upon record, thereby giving notice to the world that the title passed out of him into his father. Street, seeing this record, and the father in possession, purchased the land without notice and in good faith, and it would be wrong to allow him, under these circumstances, to be ejected from the land by the heirs at law of C. C. R. Taylor, Taylor having put it in the power of his father to sell the land to an innocent purchaser.

Judgment affirmed.

NOTE.—*Delivery of deed; registration as evidence.*

The recording of a deed is evidence from which a delivery may be presumed; but still it affords only a ground for presumption, a presumption of fact; it may be rebutted and destroyed by other evidence. Boardman v. Dean, 34 Pa. 252, 254; Union Mut. L. Ins. Co. v. Campbell, 95 Ill. 237, 35 Am. Rep. 166; Robinson v. Gould, 26 Iowa, 89; Lawrence v. Farley, 24 Hun, 263; Bensley v. Atwill, 12 Cal. 231; Kille v. Ege, 79 Pa. 15; Rigler v. Cloud, 14 Pa. 361; Bulkley v. Buffington, 5 McLean, 457; Warren v. Jacksonville, 15 Ill. 236, 58 Am. Dec. 610; Boardman v. Dean, 34 Pa. 252; Wellborn v. Weaver, 17 Ga. 267; Bullitt v. Taylor, 34 Miss. 708; Rowell v. Hayden, 40 Me. 582; Ingraham v. Grigg, 13 Smedes & M. 22; Juvenal v. Jackson, 14 Pa. 519; Balbec v. Donaldson, 2 Grant, Cas. 459; Blight v. Schenck, 10 Pa. 285, 51 Am. Dec. 478; Burke v. Adams, 80 Mo. 504, 50 Am. Rep. 510. See also Pearce v. Dansforth, 13 Mo. 360; Eau Claire Lumber Co. v. Anderson, 13 Mo. App. 429; Swiney v. Swiney, 14 Lea (Tenn.) 316; Hendricks v. Rasson, 53 Mich. 575; 1 Devlin, Deeds, 268.

The registration of a deed by the grantor without the grantee's knowledge or assent does not of itself operate as a delivery. Tharp v. Jarrell, 66 Ind. 52; Jones v. Bush, 4 Har. (Del.) 1; Hendricks v. Rasson, 53 Mich. 575; Hawkes v. Pike, 105 Mass. 560; Parker v. Hill, 8 Met. 447; Maynard v. Maynard, 10 Mass. 456, 6 Am. Dec. 146; Barns v. Hatch, 3 N. H. 304; Samson v. Thornton, 3 Met. 275, 37 Am. Dec. 135; Berkshire Mut. F. Ins. Co. v. Sturgis, 13 Gray, 177; Patterson v. Snell, 67 Me. 559; Hadlock v. Hadlock, 22 Ill. 384. See Barr v. Schroeder, 32 Cal. 610; Jefferson Co. Bldg. Asso. v. Heil, 81 Ky. 513; Walsh v. Vermont Mut. F. Ins. Co. 54 Vt. 351.

Estoppel by deed.

No person can be allowed to dispute his own solemn deed, which is therefore conclusive against him, and those claiming under him, even as to the facts recited in it. Shep. Touch. 53; Wharton, Law Lex. title, *Estopped;* Anderson, Law Dict. title, *Estoppel.*

In order that a deed may operate as an estoppel, it is essential that it should be valid as a transfer of the grantor's interest. James v. Wilder, 25 Minn. 305; Caffrey v. Dudgeon, 38 Ind. 512; Merriam v. Boston, C. & F. R. Co. 117 Mass. 241; Conant v. Newton, 126 Mass. 105; Pells v. Webquish, 129 Mass. 469; Shevlin v. Whelen, 41 Wis. 88.

The general rule is that only parties and privies are bound by an estoppel. Kitzmiller v. Van Rensselaer, 10 Ohio St. 63; Cottle v. Sydnor, 10 Mo. 763; Sunderlin v. Struthers, 47 Pa. 411. See also Ray v. Gardner, 82 N. C. 146; Griffin v. Richardson, 11 Ired. L. 439.

The grantor will not be permitted to claim that the purchaser should have placed his deed on record, in order to prevent a wrongful transfer by the grantor subsequently of the same title to another. Williamson v. Williamson, 71 Me. 442; Howard v. Massengale, 13 Lea, 577.

A party is not estopped from showing the truth when the truth appears upon the instrument itself. Wheelock v. Henshaw, 19 Pick. 341; Sinclair v. Jackson, 8 Cow. 543; Pelletreau v. Jackson, 11 Wend. 118; Cuthbertson v. Irving, 4 Hurlst. & N. 742; Pargeter v. Harris, 7 Q. B. 708. See McCleerey v. Wakefield (Iowa) 2 L. R. A. 529.

See also 7 L. R. A. 555; 11 L. R. A. 573; 38 L. R. A. 238.

TENNESSEE SUPREME COURT.

Theodore READ *et al.*
v.
E. C. MOSBY and Wife, M. F. Mosby, *Appts.*

Sarah A. SMITHWICK *v.* SAME.

(.....Tenn.....)

A conveyance, by an insolvent heir presumptive, to his wife, of his expectancy in the estate of his father, then living, upon no other consideration than love and affection, is invalid, in equity, as against his creditors whose debts were in existence either at the date of the deed or at the death of his father.

(June 4, 1889.)

APPEAL by defendants from a decree of the Court of Chancery of Shelby County in favor of complainants in a suit to have their judgments against defendants satisfied out of the property of their debtors. *Affirmed.*

The case is stated in the opinion.

Mr. **W. P. Wilson,** for appellants:

The execution and delivery of the written transfer by defendant E. C. Mosby to his wife and co-defendant M. F. Mosby, and the registration of the same, makes the gift valid as between the parties, also against creditors of the grantor.

McEwen v. *Troost*, 1 Sneed, 186.

The sale or assignment, in good faith and for a valuable consideration, of the estate of an heir apparent, is valid, and will be upheld and enforced in courts of equity.

Fitzgerald v. *Vestal*, 4 Sneed, 259; *Steele* v. *Frierson*, 85 Tenn. 430.

Voluntary conveyances are protected by the Statute of Frauds, in all cases where they do not break in upon the legal rights of the creditors.

1 Story, Eq. 355.

In equity the transfer of the right and title of the heir apparent takes effect *in præsenti*, and not at death of ancestor.

3 Pom. Eq. Jur. §§ 1271, 1288; Story, Eq. § 1040 *b*.

An expectancy is not subject to the claims of creditors of the heir apparent either in law or equity.

Fitzgerald v. *Vestal*, 4 Sneed, 259.

The Code excludes an expectancy, from liability to creditors of heirs apparent.

T. & S. Code, § 4283; Adams, Eq. p. 147; *Leslie* v. *Joyner*, 2 Head, 515.

A sale of any interest which the creditor could not reach by process of law cannot be void as to such creditor, because he is not injured thereby.

Story, Eq. §§ 366, 367; *Wagner* v. *Smith*, 13 Lea, 560; Bump, Fraud. Conv. 239, 535; Wait, Fraud. Conv. § 15.

When property is not subject to the demands of creditors, a conveyance of the same with intent to defraud such creditors does not come within our Statute of Frauds.

O'Conner v. *Ward*, 60 Miss. 1026; 3 Washb. Real Estate, 333; 3 Parsons, Cont. p. 49.

Voluntary alienation of property not liable in law or equity to execution is not interdicted.

Cosby v. *Ross*, 3 J. J. Marsh. 290, 20 Am. Dec. 140.

Creditors cannot be defrauded, hindered, nor delayed by the transfer of property which neither in law nor in equity can be made to contribute to the satisfaction of their debts.

Freem. Exec. 138; Atherley, Mar. Sett. 220, 221; Roberts, Fraud. Conv. 343; *Fellows* v. *Lewis*, 65 Ala. 343; *Rucks* v. *Hooke*, 3 Lea, 302.

The owner of property exempt from execution may confer a clear and valid title to it by sale or gift without regard to his motives.

NOTE.—*"Heir presumptive," and "heir apparent" defined.*

An heir presumptive is one who would be the heir if the ancestor were to die at the contemplated time, but whose possibility of inheritance may be destroyed by the birth of some one more nearly related, as well as by his death before the ancestor.

An heir apparent is one who is sure to inherit if the ancestor dies in his lifetime. These terms are of no practical importance, as no rights of property are acquired by such parties which the law in any way recognizes. See Lockwood v. Jesup, 9 Conn. 272; Tiedeman, Real Prop. 508.

Future contingent interests, assignment of.

The deed of an heir apparent conveying his ancestor's estates has been held to attach in equity to the estate, upon the death of the ancestor. Stover v. Eycleshimer, 46 Barb. 84; Trull v. Eastman, 3 Met. 121.

An assignment, for a valuable consideration, of personal property to be acquired at a future time, operates as an equitable assignment and vests an equitable ownership of the articles in the purchaser, or they are acquired by the vendor without any further act on the part of either; and this ownership a court of equity will protect and maintain at the suit of the equitable assignee. Holroyd v. Marshall, 10 H. L. Cas. 191; *Re* Ship Warre, 8 Price, 389 *note* 273; Mitchell v. Winslow, 2 Story, 630; Seymour v. Canandaigua & N. F. R. Co. 25 Barb. 284, 303; Phila. W. & B. R. Co. v. Woelpper, 64 Pa. 366, 372; Baxter v. Bush, 29 Vt. 465, 469; Page v. Gardner, 20 Mo. 507; Smithurst v. Edmunds, 14 N. J. Eq. 408; Williams v. Winsor, 12 R. I. 9; Clay v. East Tenn. & V. R. Co. 6 Heisk. 421; 3 Pom. Eq. Jur. 800.

Under the statutes all future contingent interest in things real or personal, and also all possibilities, coupled with an interest, of acquiring property, real or personal, may be granted or assigned at law; and equity will enforce the assignment when the possibility or expectancy has changed into a vested interest or possession. Warmstrey v. Lady Tanfield, 1 Ch. Rep. 29, 2 Eq. Lead. Cas. [*729] 1530, 1559, 1605 (4th Am. ed.); Wright v. Wright, 1 Ves. Sr. 409; Beckley v. Newland, 2 P. Wms. 182.

The expectancy of an heir to the estate of his ancestor. Hobson v. Trevor, 2 P. Wms. 191; Stover v. Eycleshimer, 4 Abb. App. Dec. 309, 46 Barb. 84; McDonald v. McDonald, 5 Jones, Eq. 211; Fitzgerald v. Vestal, 4 Sneed, 258.

The interest which one may take under the will of another who is still living. Bennett v. Cooper, 9 Beav. 252; *Re* Wilson's Estate, 2 Pa. 325. See also Varick v. Edwards, Hoffm. Ch. 382, 11 Paige, 289, 5 Denio, 664; McWilliams v. Nisly, 2 Serg. & R. 507; Bayler v. Com. 40 Pa. 37; Nimmo v. Davis, 7 Tex. 26; Graham v. Henry, 17 Tex. 164; Horst v. Dague, 34 Ohio St. 371; Patton v. Coen & T. B. Carriage Mfg. Co. 3 Colo. 265; The Edward Lee, 3 Ben. 114; Sedam

5 L. R. A.

See also 23 L. R. A. 82.

Carhart v. *Harshaw*, 45 Wis. 340, 30 Am. Rep. 752; *Currier* v. *Sutherland*, 54 N. H. 475, 20 Am. Rep. *notes*, 150; *Pike* v. *Miles*, 23 Wis. 164; *Boynton* v. *McNeal*, 31 Gratt. 456.

What is termed a bare or mere possibility signifies nothing more than an expectancy.

Smith, Real Prop. 249; *Sturm* v. *White*, 8 Baxt. 197.

Whenever the parties by their contract intended to create a positive lien, or charge, either upon real or personal property, it attaches in equity as a lien or charge as soon as the assignor or contractor acquires a title thereto, against the latter and all persons asserting a claim thereto, under him, either voluntary, or with notice, or in bankruptcy.

Mitchell v. *Winslow*, 2 Story, 644; *Apperson* v. *Moore*, 30 Ark. 56, 46 Am. Dec. *note*, 717; 4 Kent, Com. 98; *Trull* v. *Eastman*, 3 Met. 121; *Royston* v. *Wear*, 3 Head, 8; *Huffaker* v. *Bowman*, 4 Sneed, 90; *Birdwell* v. *Cain*, 1 Coldw. 303; *Gregg* v. *Jones*, 5 Heisk. 458.

A gift from a husband to his wife, at a time when his right to make it cannot be disputed, is not assailable by his creditors, or by his assignee in bankruptcy.

Stewart v. *Platt*, 101 U. S. 731 (25 L. ed. 816); *Jones* v. *Clifton*, 101 U. S. 225 (25 L. ed. 908).

Public policy, as a basis of judicial decision, is wholly unreliable.

Mills v. *Mills*, 3 Head, 707; Maples, Attachm. and Garnishment, 23.

Messrs. **Craft & Craft** and **Frayser & Scruggs** for appellees.

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

Complainants are judgment creditors of E. C. Mosby, and have filed this bill, attaching the property described in the pleadings as the property of their debtor, and seek to have their judgments satisfied out of same. The defendant Mrs. M. F. Mosby, wife of the debtor, claims title to the attached property, which is real estate, by virtue of an instrument executed to her by her husband, and which is in the following words:

Memphis, Tenn., August 20, 1884.

Know all men by these presents, that I, E. C. Mosby, of Shelby County, Tennessee, for the consideration of the love and affection I bear her, hereby transfer to my beloved wife, M. F. Mosby, all the right, title, and interest which I may hereafter inherit, or that may be bequeathed and devised, of the estate of my father, Samuel Mosby, who is also a resident of Shelby County, Tennessee. It is my meaning and intention to place my said wife in my place and stead in respect to my expectancy from my said father's estate after his death, and it is my desire and intention that all interest which I will have in the lands of which my said father shall die seised and possessed shall vest absolutely in my said wife, and she shall have the like right to all personal effects that would be mine; and this conveyance from me to her comprehends the whole title to the lands, and right to the personal property, moneys, choses in action, and assets of every nature and description. In witness whereof, I, E. C. Mosby, do hereby set my hand and seal the day and year above written.

[Signed] E. C. Mosby.

This paper was duly acknowledged and registered before the death of Samuel Mosby. The property attached is an undivided interest in real estate which descended to E. C. Mosby from his father, who died intestate in March, 1886. E. C. Mosby was insolvent at the time of his conveyance of this expectancy, and complainants were then creditors by judgment.

The question is whether this conveyance of a bare expectancy by an heir presumptive is operative, when made upon no other consideration than love and affection, to vest such title and interest in the grantee as will defeat creditors of the conveyance who were creditors both

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v. Cincinnati & W. Canal Co. 2 Disney, 309; *Re* Irving, L. R. 7 Ch. Div. 419; 3 Pom. Eq. Jur. 299.

Mere possibilities not assignable.

The authorities are not uniform, for it is held that the mere hope or expectation of receiving that to which the assignor had no right and which might be withheld from him at pleasure, such as the expectancy of an heir to inherit his ancestor's estate, or the hope of a bequest, is not an interest capable of assignment in equity any more than at law. See Needles v. Needles, 7 Ohio St. 432; Cal. Civ. Code, §§ 700, 1045; 3 Pom. Eq. Jur. 289; Smith, Real Prop. 249; Skipper v. Stokes, 42 Ala. 255; Huling v. Cabell, 9 W. Va. 522; Fortescue v. Satterthwaite, 1 Ired. L. 566.

A contract by an heir to convey on the death of his ancestor, living the heir, a certain undivided part of what shall come to the heir by descent, distribution, or devise, is a fraud upon the ancestor productive of public mischief, and, moreover, in the nature of a wager, without furnishing any means of computing the risks, etc., as to the amount of property and the value of the inheritance, and is therefore void both in law and in equity. Boynton v. Hubbard, 7 Mass. 119.

And yet such a contract has been held to be valid if made with the ancestor's consent for a valuable consideration and without imposition upon the heir. Fitch v. Fitch, 8 Pick. 480.

Neither the English nor the American statutes allow the legal assignment of mere naked possibilities or expectancies, not coupled with an interest. See Eng. Stat. 8 and 9 Vict. chap. 106; 1 N. Y. Rev. Stat. 725, § 35; Cal. Civ. Code, §§ 690, 693, 700, 1045; Lawrence v. Bayard, 7 Paige, 70; Tooley v. Dibble, 2 Hill, 641.

By the term in the Revised Statutes, "expectant estates," the Legislature intended to include every present right or interest, either vested or contingent, which may by possibility vest in possession at a future day, forever putting the question at rest in this State. Freeborn v. Wagner, 49 Barb. 56; 3 Pom. Eq. Jur. 297.

There cannot be a grant of a mere possibility, unless coupled with a vested interest. It must be a vested present future estate. Fulwood's Case, 4 Coke, 66; Davis v. Hayden, 9 Mass. 519; Trull v. Eastman, 3 Met. 121; Jackson v. Catlin, 2 Johns. 261; Dart v. Dart, 7 Conn. 255; Bayler v. Com. 40 Pa. 37; 3 Washb. Real Prop. 348; Tiedeman, Real Prop. 624.

In East Lewisburg Lumber & Mfg. Co. v. Marsh, 91 Pa. 96, 99, the court said: "Equity will support assignments of contingent interests and expectancies, things which have no present actual existence, but rest in mere possibility, not indeed as a present positive transfer operating *in præsenti*, for that can only be of a thing *in esse*, but as a present contract to take effect and attach as soon as the thing comes *in esse*." Rupie v. Bindley, 91 Pa. 236; *Re* Wilson's Estate, 2 Pa. 325.

when the deed was made and when by descent cast their debtor became seised of the legal title. For the wife, it has been argued by the learned counsel who have appeared for her that the expectancy, when conveyed, was not liable to creditors, and that, therefore, the grant is not fraudulent, within the meaning of the Statute of Frauds. The general rule is that, in order to invalidate a gift or other voluntary conveyance under the Statute of Frauds, the property must be of a kind to which the creditor can resort for payment; for otherwise he is not prejudiced by the conveyance. *Leslie* v. *Joyner*, 2 Head, 515; *Wagner* v. *Smith*, 13 Lea, 560; Adams, Eq. *147; Story, Eq. Jur. § 361.

No argument is necessary to establish the proposition that the expectancy of a son in the estate of his parent is not such a property interest as is the subject of attachment by a creditor during the life of the parent, and complainants do not put their case on any such absurd ground. In such a case, the son has no property right whatever in the estate of the living parent. His hope of an interest upon his death can be denominated by no designation importing any personal interest, and hence is called an expectancy. But if this hope or expectancy imparts no such present interest as can be resorted to by creditors, can it be the subject of such a sale, grant, or assignment during the life of the parent as will operate to vest the title in the assignee when the hope has ripened into an actual interest by descent cast?

At the date of the deed under consideration, it is manifest that Mr. Mosby had no title or interest in the property which subsequently came to him by descent, and his deed did not, at the time of its execution, operate to confer upon his wife any title whatever. It does not purport to convey any present interest in possession or remainder or reversion. It is not essential that one should be in the present enjoyment or possession of property in order to validate a conveyance. A vested remainder is as much an estate subject to grant as a fee simple. So there are future estates which are contingent in which the interest is such that a valid assignment may be made, such as estates depending upon the happening of some uncertain event, or limited to some uncertain person, but based upon some existing limitation or conveyance or will. The ordinary contingent remainder or executory devise are examples.

"So there are," says Mr Pomeroy, "a class of interests which are not present existing interests, but which depend upon some executory agreement or contract, and under which the possibility of acquiring future property exists. A court of equity will recognize the assignability of such possibility in proper cases, and, upon the acquisition of such property, enforce the agreement as an executory assignment." Pom. Eq. Jur. § 1286, and cases cited.

Personal property not *in esse* is not the subject of sale, as a general rule. Upon this subject Mr. Benjamin says: "Things not yet existing, which may be sold, are those which are said to have a potential existence; that is, things which are the natural product or expected increase of something already belonging to the vendor. A man may sell the crop of hay to be grown on his field, the wool to be clipped from his sheep at a future time, the milk that his cows will yield in the coming month; and the sale is valid." 1 Benjamin, Sales, 95.

So the sale of an unborn colt has been held valid, and to pass the title to the colt when it comes. *McCarty* v. *Blevins*, 5 Yerg. 195.

So a crop to be raised upon land of the mortgagor is the subject of a valid mortgage. *Tedford* v. *Wilson*, 3 Head, 312; *Polk* v. *Foster*, 7 Baxt. 98. "But," says the author just quoted, "he can only make a valid agreement to sell, not an actual sale, where the subject of the contract is something to be afterwards acquired, as the wool of any sheep or the milk of any cows that he may buy within the year, or any goods to which he may obtain title within the next six months." 1 Benjamin, Sales, 96.

Upon this ground a mortgage upon a stock of goods, out of which the conveyor is to sell, and replenish, the mortgage to attach to new goods as acquired, is void. *Tenn. Nat. Bank* v. *Ebbert*, 9 Heisk. 153; *Bank of Rome* v. *Haseltón*, 15 Lea, 217.

A seeming exception to the latter rule is the case of a mortgage by a railroad company of all its rolling stock then owned, as well as such as it might afterwards acquire. Such a mortgage has been held to give to the mortgagee a prior lien on such property only when the mortgage has been so far executed that the after-acquired property had actually come to the possession of the mortgagee. *Clay* v. *East Tenn. & V. R. Co.* 6 Heisk. 421.

This was clearly upon the doctrine that such a mortgage was only an executory agreement, and its validity only upheld, as suggested by *Chancellor* Cooper, in *Phelps* v. *Murray*, 2 Tenn. Ch. 753, upon the ground of the public interest involved in the enforcement of such contracts.

Lower than any of the property interests we have been considering is a mere expectancy, not based on any existing contract, deed, limitation, or will, such as the mere hope or expectation of a child that it will inherit from a living parent. At law, a deed conveying such a bare future expectancy in real estate is held absolutely void, and for the reason that there was no title or property interest upon which it could operate.

Speaking of the effect of such a grant, Prof. Washburn, in his learned work upon the Law of Real Property, says: "But every right is not the subject of a grant, though it relates to land, or an interest therein. Thus, a bare possibility of an interest which is uncertain is not grantable, though a possibility, coupled with a present interest, may be granted. It has accordingly been held that a grant by an heir apparent of an interest in his ancestor's estate, so long as his ancestor is living, conveys nothing, and is inoperative. But when an heir apparent, who was indebted to another, assigned his interest in his ancestor's estate, with a power of attorney to make all deeds, etc., necessary to receive the proceeds, it was held to give him such an interest that equity protected it against the claims of a creditor of the heir who attached the estate at the ancestor's death. . . . It must be an interest in the land existing in possession, reversion, remainder, by executory devise, or contingent remainder." 3 Washb. Real Prop. bottom p. 636.

To the same effect is the opinion of the editor of the note to the seventh edition of Smith's Leading Cases (volume 1, p. 829), who cites a large number of cases as supporting the view we have expressed as to the effect of such a grant, considered apart from the effect which might result from covenants of seisin, further assurance, or of warranty. There is much conflict in the authorities as to the operation of covenants of warranty in estopping the grantor under such a deed, and some cases have gone to the extent of holding that, by operation of such covenants, the estate would pass when acquired. 1 White & T. Lead. Cas. Eq. 4th ed. 829, and cases cited; 3 Washb. Real Prop. bottom pp. 636, 637, and cases cited.

It is unnecessary to consider what would be the effect at law of such a covenant, for the reason that the grant under consideration contains no covenants of any sort. It would seem, however, that if the title should pass when acquired, as an effect of an estoppel upon the grantor, creditors of the grantor would not be estopped to assail the deed as fraudulent under the Statute of Frauds. In such case the title would descend to the heir, and, if the heir's covenant should operate to then convey the title to the grantee, such conveyance, being operative only from the time of seisin by the heir, would be a conveyance of an interest which could have been resorted to by the creditor, who would not be estopped to show that the deed was void as to him. If the conveyance had been upon a good consideration, this instantaneous seisin by the debtor might be insufficient to have fastened a judgment lien upon the land, or to justify a court of equity in subjecting the title to a creditor. *Birdwell* v. *Cain*, 1 Coldw. 301; *Gregg* v. *Jones*, 5 Heisk. 458.

But, while such a grant is clearly void at law, yet in certain cases such assignments are by courts of equity protected and enforced. Whether enforced upon the theory so strenuously advocated by Mr. Pomeroy in his very able work upon Equity Jurisprudence, that such a conveyance is an equitable assignment of a present possibility, which changes into an assignment of the equitable ownership as soon as the property is acquired by the grantor, or as a mere executory agreement, which will be specifically enforced by a legal conveyance and delivery of the property when acquired, can make little difference, save in cases where a specific performance is resisted by the grantor. In any view of it, the right acquired by the assignee of such an expectancy is one only cognizable and enforceable in equity. 3 Pom. Eq. Jur. § 1278.

Nor will a court of equity protect or enforce such a contract, unless it be altogether such a one as appeals to the equitable consideration of a court. The consideration upon which it rests ought to be rigidly scrutinized, and all the purposes and circumstances of its execution inspected and considered. Such contracts are not, and ought not to be, favored in equity, even as between the parties to the agreement.

Concerning such agreements, Sir John Strange, in the case of *Chesterfield* v. *Janssen*, said: "The courts keep a strict hand over these agreements, which must, indeed, all stand on their own particular circumstances; and perhaps it is not advisable to lay down any general rule about them, or more than is necessary to the relief in each particular case." 2 Ves. Sr. 125.

In the same case *Lord* Hardwicke, in considering the evils likely to result from such assignments, or debts created upon the credit of such expectations, said: "In most of these cases have concurred deceit and illusion on other persons not privy to the fraudulent agreement. The father, ancestor, or relation, from whom was the expectation of the estate, has been kept in the dark. The heir or expectant has been kept from disclosing his circumstances, and resorting to them for advice, which might have tended to his relief and also reformation. This misleads the ancestor, who has been seduced to leave his estate, not to his heir or family, but to a set of artful persons, who have divided the spoil beforehand." *Ibid.*

The case of *Fitzgerald* v. *Vestal*, 4 Sneed, 258, has been cited by counsel for appellant as sustaining her contention that the interest assigned was not one subject to creditors. The case, on its facts, is to be readily distinguished from this one. The learned judge, in the course of his opinion sustaining the assignment as against an attaching creditor, did say that, even if the sale had been made for the purpose of defeating creditors, it was the transfer of a property which the creditor could not reach. This was a clear inadvertence, for the case called for no such announcement, for the opinion expressly states that there was no evidence to support the charge that the sale had been made to defeat creditors. Upon the contrary, the opinion finds that the assignment was for money advanced at the time and with the consent and approval of the ancestor from whom the expectancy was to come, and that he was indeed willing and proposed to give the shares of the vendors, by will, to purchasers, but, being advised that he could not do that, then agreed to make his will as he had before determined to do, so that the assignors should take the interest which they, with his approval, had sold.

In the case of *Steele* v. *Frierson*, 85 Tenn. (1 Pickle) 435, we had occasion to pass upon a similar assignment. The transfer in that case was to pay a surety who, for the assignor, had been compelled to pay a very large sum. The debt was a highly meritorious one, and the assignment was in the most absolute good faith, and it was therefore upheld by this court. The assignment under which Mrs. Mosby claims was made by an insolvent debtor, and, whether so intended or not, it operates in law as a fraud upon his creditors. It was not made for a valuable consideration, and is nothing but a settlement made upon the wife by a husband, unable with justice to his creditors, to make such a conveyance. Under these circumstances, a court of equity cannot protect or enforce such a grant, as against creditors whose debts were in existence either at the date of the deed or at the time the grantor, by descent, became seised of the title to the property sought to be conveyed.

The decree of the chancellor, subjecting the property to the satisfaction of complainants' debt, must be affirmed.

The case of Sarah A. Smithwick against the same parties, and presenting a similar question, was heard with this, and a like decree

will therefore be entered, affirming the decree of the chancellor in that case.

Folkes, *J.*, having been of counsel, did not sit upon the hearing of this case. **Randolph,** *Sp. J.*, who sat in his place, does not concur in the conclusion reached.

INDIANA SUPREME COURT.

CITY OF SEYMOUR, *Appt.*,
v.
CUMMINS.

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

1. **An administrator, and not the heirs, of a decedent, is the proper party to** prosecute an action which accrued during the lifetime of the decedent, for damages against a city for the improper construction of a ditch, whereby the decedent's real estate was injured.
2. **A complaint, which alleges that the ingress and egress to and from decedent's premises was obstructed by a ditch,** and that the house on the premises was rendered untenantable by poisonous vapors and smells arising from corrupt and filthy water in the ditch, and that the fall is insufficient to carry the water off and it remains stagnant therein, is sufficient, without alleging that decedent had any private interest in the streets along which the ditch is constructed, differing from that of the general public.
3. **Rulings on motions,** not presented by the record, cannot be considered.
4. **A city is liable for defective plans for drainage,** where the construction and maintenance of improper drainage in accordance with the plans create a nuisance and obstruct private or public ways in which the property owner has a special interest.
5. **Consequential damages for injury to real estate** accrue to the person owning the land at the time of the injury; and if, after commencing an action for such injury, he sells and conveys the land, this will not affect his right to recover.
6. **The city cannot defend** on the ground that the digging of the ditch and the construction of the same were done by the contractor in the exact manner contracted for by the city. A bad reply is good to a bad answer, on demurrer to the reply.

(May 27, 1889.)

APPEAL by defendant from a judgment of the Circuit Court of Jennings County in favor of plaintiff in an action for damages for the construction of an open ditch on the ways or streets on the sides of plaintiff's residence. *Affirmed.*

The facts are stated in the opinion.

Messrs. **O. H. Montgomery** and **A. P. Charles** for appellant.

Mr. **Wm. K. Marshall** for appellee.

NOTE.—*Sewers and drains; liability of corporation for negligent construction.*

Where the duty as respects drains and sewers ceases to be judicial, or quasi judicial, and becomes ministerial, then, although there be no statute giving the action, a municipal corporation is liable for the negligent discharge or the negligent omission to discharge such duty, resulting in an injury to others. Barton v. Syracuse, 36 N. Y. 54, 37 Barb. 292; Child v. Boston, 4 Allen, 41; Emery v. Lowell, 104 Mass. 13; McGregor v. Boyle, 34 Iowa, 268. Compare Dermont v. Detroit, 4 Mich. 435; Montgomery v. Gilmer, 33 Ala. 116; Gilmer v. Montgomery, 26 Ala. 665; Jones v. New Haven, 34 Conn. 1; Logansport v. Wright, 25 Ind. 512; 2 Dillon, Mun. Corp. 936.

The work of constructing gutters, drains, and sewers is ministerial; and when, as is usually the case, the undertaking is a corporate one, the corporation is responsible in a civil action for damages caused by the careless or unskillful manner of performing the work.

In Child v. Boston, 4 Allen, 41, it is held that the mayor and aldermen of Boston, in building sewers, act as public statutory officers, and not as agents of the city; but generally the power to construct sewers is private or corporate.

This is very clearly explained by Manning, *J.*, in Detroit v. Corey, 9 Mich. 165, 184; Mills v. Brooklyn, 32 N. Y. 489; Dermont v. Detroit, *supra;* Ross v. Madison, 1 Ind. 281; Kensington v. Wood, 10 Pa. 93, 95; 2 Dillon, Mun. Corp. 957.

Where a city undertakes to construct a sewer and does it negligently, it is liable for injuries resulting from such negligence, without proof that it had notice of the defects. 2 Dillon, Mun. Corp. 3d ed. § 1024; Fort Wayne v. Coombs, 5 West. Rep. 222, 107 Ind. 75.

If the city caused the sewer to be constructed, and adopted it and used it, it can make no difference who constructed it, or controlled its construction, or owned the land on which it was built. It is enough that the city adopted it and used it. Aurora v. Colshire, 55 Ind. 434; Fort Wayne v. Coombs, *supra.*

So where a sewer was built by an incompetent engineer. Rochester White Lead Co. v. Rochester, 3 N. Y. 463; Seifert v. Brooklyn, 2 Cent. Rep. 136, 101 N. Y. 136.

In Canada, where a drain was so unskillfully constructed by the corporation contractors as not to carry off water, but to carry filth from the main sewer into plaintiff's cellar, which for months he had endured, it was held that he was entitled to sue the corporation for the recovery of substantial damages, though no by-law for the making of the drain was proved. Reeves v. Toronto, 21 U. C. Q. B. 160; 2 Dillon, Mun. Corp. 935.

So if quantities of earth were thrown upon and permitted to continue, so that in times of rain, mud and water were driven on plaintiff's messuage, he was held entitled to sue the corporation for damages. Farrel v. London, 12 U. C. Q. B. 343. See also Perdue v. Chinguacousy Twp. 25 U. C. Q. B. 61.

Act done must be without authority, or be improperly done.

A municipal corporation is not liable for damage to private property, unless the act complained of was without authority or against law, or was improperly or wantonly executed. Weeks. Damnum Absque Injuria, 21; Shearm. & Redf. Neg. § 127; Seifert v. Brooklyn, 2 Cent. Rep. 136, 101 N. Y. 136.

It is not liable where a sewer commissioner, without authority, conducts the water of a sewer onto private land. Kiernan v. Jersey City, 11 Cent. Rep. 551, 50 N. J. L. 246.

5 L. R. A.

See also 7 L. R. A. 465; 13 L. R. A. 841; 14 L. R. A. 495; 18 L. R. A. 151; 24 L. R. A. 333; 46 L. R. A. 428, 636; 47 L. R. A. 312; 48 L. R. A. 421.

Olds, J., delivered the opinion of the court: This action was commenced by John J. Cummins in his lifetime, and he died during the pendency of the action in the court below. His death was suggested, and Mary J. Cummins, administratrix of his estate, was substituted as plaintiff. It is an action for damages for the construction of an open ditch on the ways or streets on two sides of a residence property owned by the decedent within the City of Seymour. The complaint alleges the manner in which the ditch was constructed, by which the decedent's real estate was depreciated in value, rendered uninhabitable, and the means of ingress and egress to and from the said real estate was obstructed. There was a demurrer to the complaint by the appellant, which was overruled, and exceptions reserved.

The first error assigned and discussed is the overruling of the demurrer to the complaint. One of the objections urged to the complaint is that the heirs of the decedent are the proper parties plaintiff, instead of the administratrix. This objection is not well taken. The cause of action accrued during the lifetime of the decedent, and it survived, and his administratrix is the proper party to prosecute the action for damages. Rev. Stat. 1881, §§ 281–283.

There is a further objection urged to the complaint,—that the complaint does not show any specific private interest the decedent had in the streets or ways along which the ditch is constructed differing from that of the general public. In this counsel for appellant are in error. The complaint clearly states and shows that the ditch was ten feet wide and three feet deep; that the decedent had sustained specific injuries by the obstruction of all means of ingress and egress to and from his said premises, on which he had erected a valuable dwelling-house; that the ditch was dug so near to the line of his lot that the soil of his lot from time to time falls into the ditch; that the corrupt, filthy, and poisonous water from the swamp and other surface water and sewage from the woolen-mills are turned into the ditch, and the fall is insufficient to carry it off, and it remains in said ditch as stagnant water, and poisonous and unwholesome vapors and smells permeate and render impure the air over his lot, and within his residence property, and malaria and disease are generated thereby, whereby said house and premises are rendered untenantable, and that said ditch was constructed in 1877, and has ever since been maintained by said city in the same condition, and said ditch is a permanent one, and it was not the natural outlet for such drainage, and said drainage should have been by under-ground sewerage, and not by an open drain. The complaint was sufficient, and there was no error in overruling the demurrer.

The next error assigned is the overruling of appellant's motion to separate the causes of action stated in the complaint. This question is not presented by the record. It can only be presented by bill of exceptions, or by proper record made at the time. No bill of exceptions was filed at the time of the ruling, and no time was given to file any, as appears of record. If, however, the question was properly presented by the record, there was no error in the ruling, as there was but one cause of action stated in the complaint. Appellee filed a motion to

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A town is not liable for damage done to adjoining premises by water leaking from a flume which, in excess of its authority, it had permitted to be built in the streets. Idaho Springs v. Filteau, 10 Colo. 105.

A city is not liable for an injury to private property from the breaking of a public sewer from faulty construction, unless notified of such faulty construction. Kiernan v. Jersey City, *supra*.

It is not liable for an overflow caused by an unusual rainfall that could not have been reasonably expected. Harrigan v. Wilmington (Del.) 11 Cent. Rep. 251.

Not responsible for error or want of judgment.

The corporation is not responsible for any error or want of judgment upon which its system of drainage was devised. Mills v. Brooklyn, 32 N. Y. 489.

The municipality need not take scientific counsel before undertaking the construction of a sewer, in order to give exemption from liability for errors of judgment. Harrigan v. Wilmington (Del.) 11 Cent. Rep. 251.

Such a case is distinguishable from one where there is a want of skill in constructing the work when entered upon. McCarthy v. Syracuse, 46 N. Y. 194; 2 Dillon, Mun. Corp. 935.

If the inadequacy in the size of a sewer is owing to the omission to exercise ordinary skill and care in planning and performing the work the municipal corporation is liable; but if the inadequacy of the sewer is attributable to a mere error of judgment, there is no liability. North Vernon v. Voegler, 1 West. Rep. 314, 103 Ind. 314; Crawfordsville v. Bond, 96 Ind. 236; Evansville v. Decker, 84 Ind. 325, 43 Am. Rep. 86; Cummins v. Seymour, 79 Ind. 491, 41 Am. Rep. 618; Weis v. Madison, 75 Ind. 241, 39 Am. Rep. 135; Indianapolis v. Huffer, 30 Ind. 235; Rice v. Evansville, 6 West. Rep. 242, 108 Ind. 7.

Liable for neglect to repair.

After sewers are constructed, the duty of the city to keep them in repair is ministerial, and for an omission to perform that duty it is liable. Hines v. Lockport, 50 N. Y. 236; Seifert v. Brooklyn, 2 Cent. Rep. 136, 158, 101 N. Y. 136; Barton v. Syracuse, 37 Barb. 292.

The city is liable for an injury occurring through its neglect to repair a sewer after a lapse of time warranting the presumption of notice of the defect. McCarthy v. Syracuse, 46 N. Y. 194; Seifert v. Brooklyn, *supra*.

The law requires it to use ordinary care and watchfulness to prevent such improvement from falling into gradual decay. It must periodically inspect its sewers for the protection of the public, and it cannot relieve itself from such duties by the manner in which it constructs them. Indianapolis v. Scott, 72 Ind. 196; Norristown v. Moyer, 67 Pa. 355; Rapho Twp. v. Moore, 68 Pa. 404; Todd v. Troy, 61 N. Y. 506; Logansport v. Justice, 74 Ind. 378; Fort Wayne v. Coombs, 5 West. Rep. 230, 107 Ind. 75.

Where a sewer has been adopted and used by a city, and its citizens have been expressly or implicitly authorized to connect their drains with it, if the city negligently permits it to get out of repair, it must pay the damages thereby caused to one so using it who is not himself in fault. Child v. Boston, 4 Allen, 41; Barton v. Syracuse, 37 Barb. 292, 36 N. Y. 54; Montgomery v. Gilmer, 33 Ala. 116.

There is considered to be no liability in Massachusetts on the part of a city for failing to keep a

make the complaint more specific, and to strike out parts of the complaint, which motions were overruled, and exceptions reserved, and the rulings on the motions are assigned as error.

There were no bills of exceptions presented at the time of the rulings, nor was time given to present and file the same, and there is no question presented as to such rulings by the record. *Rhine* v. *Morris*, 96 Ind. 81; *Manhattan L. Ins. Co.* v. *Doll*, 80 Ind. 113; *McIlvain* v. *Emery*, 88 Ind. 298.

Demurrers were filed by appellee, and sustained, to the fourth and fifth paragraphs of appellant's answer, and the rulings are assigned as error. The fourth paragraph alleges that the land of the decedent was wet and unfit for cultivation, and that it was improved and benefited by the drain, instead of being injured and damaged as alleged in the complaint. There was no error in sustaining the demurrer to this paragraph. The general denial was pleaded, and the same evidence was admissible under the general denial as was admissible under this paragraph. The fifth paragraph of the answer alleged that all and every act and thing alleged to have been done by defendant in said complaint were done, if at all, by reliable contractors, and the defendant did not, nor did her officers, or agents and employés, take, have, or exercise any control in regard thereto, but all was done, controlled, managed and directed by Leonard W. Bartlett, who was the contractor for all work in and to the excavating, digging, and constructing the said ditch mentioned and described in said complaint, and the defendant had no control over the same in any manner whatever.

The complaint charges the defendant with having caused the line of a ditch to be surveyed, marked, and staked by her city engineer, and by her officers, servants, and employés, in September and October, 1877, dug, and caused to be dug, on the line so surveyed, an open ditch ten feet wide and three feet deep, along streets and ways on the north and west sides of said plaintiff's lot, and on one side of said plaintiff's lot it was constructed on the line of the lot, so that the soil of the lot from time to time caves and falls into said ditch, and the dirt excavated from said ditch was placed in piles, and destroyed the grade of the street; that said ditch obstructed and deprived the plaintiff of all means of access to said lot, depriving plaintiff of all means of ingress and egress to and from said premises, and it was dug and constructed for the purpose of draining a pond and other surface water from a portion of the city, and the defendant turned the sewage from a woolen-mill into the ditch, and other sewage and corrupt waters into the ditch, and that it remained stagnant therein, and poisonous and offensive odors and vapors arose therefrom, and made the air over the real estate of the plaintiff, and passing in and through the house and residence of the plaintiff, situate thereon, impure and unwholesome, rendering the premises and dwelling-house untenantable, and such corrupt, poisonous, and filthy waters, so remaining stagnant in said ditch, generated malaria and disease; and that said ditch was permanently constructed in such manner by said city, and so remained and was kept by said city as it was originally constructed, and additional sewage and corrupt and filthy waters were from time to time turned into the same by said city, up to the time of the commencement of this suit, in 1882; that one of the ways along which it was constructed adjacent to the plaintiff's premises was a private way of the plaintiff, and that it constituted a nuisance; that the natural outlet for such drainage was in another direction, and that it could not be obtained in the course in which the ditch in question was constructed.

The injury charged in the complaint was not the manner in which the work was performed

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public cesspool and sewer in repair, in consequence of which waste water accumulates and flows into neighboring cellars not connected with the sewer. Barry v. Lowell, 8 Allen, 127; 2 Dillon, Mun. Corp. 936.

Liable for discharging sewage on private property.

If a municipal corporation, by its system of constructing sewers, rendered an outlet necessary, it must provide one. Evansville v. Decker, 84 Ind. 325; Crawfordsville v. Bond, 96 Ind. 236; Van Pelt v. Davenport, 42 Iowa, 338; Byrnes v. Cohoes, 67 N. Y. 204; Fort Wayne v. Coombs, 5 West. Rep. 233, 107 Ind. 75.

It cannot discharge its sewers upon private property to the injury of the property owner, and if it does so, it is prima facie liable therefor. O'Brien v. St. Paul, 18 Minn. 176; 2 Dillon, Mun. Corp. 987.

Where the natural flow of surface water and drainage was obstructed, the city is liable for the damage caused thereby. Lynch v. New York, 76 N. Y. 60; Seifert v. Brooklyn, 2 Cent. Rep. 136, 137, 101 N. Y. 136; New York v. Furze, 3 Hill, 612; Barton v. Syracuse, 37 Barb. 292; Nims v. Troy, 59 N. Y. 500.

A municipality changing the grade in rebuilding the outlet of a street sewer, and negligently raising it above that of the sewer, thereby causing the discharge of sewage upon private premises, is liable. Defer v. Detroit (Mich.) 11 West. Rep. 530.

Where the city had emptied one of its sewers on the plaintiff's lands, it was a direct violation of his rights, a continual trespass on his property, and the city is liable, just as any private person would be. Beach v. Elmira, 22 Hun, 153; Bradt v. Albany, 5 Hun, 591; Byrnes v. Cohoes, 5 Hun, 602, affirmed, 67 N. Y. 204, 207; Seifert v. Brooklyn, *supra*.

Liable for nuisances it creates and maintains.

Although a municipal corporation had the right, under its charter, to establish a system of grading and drainage, yet this should have been done so that it would not prove a nuisance to the citizens. Smith v. Atlanta, 75 Ga. 110.

Municipal corporations have quite invariably been held liable for damages occasioned by acts resulting in the creation of public or private nuisances, or for an unlawful entry upon the premises of another, whereby injury to his property had been occasioned. Baltimore & P. R. Co. v. Fifth Baptist Church, 108 U. S. 317 (27 L. ed. 739); Seifert v. Brooklyn, 2 Cent. Rep. 138, 101 N. Y. 136.

A municipal corporation has no right to collect the sewage of a large portion of a city and by artificial channels cast it upon the lands of another: and for such acts it is liable in damages whether or not they be done in conformity to a plan adopted by its officers, judicially or otherwise. Noonan v. Albany, 79 N. Y. 475, 476; Byrnes v. Cohoes, 67 N. Y. 204; Richardson v. Boston, 60 U. S. 19 How. 263 (15 L. ed. 639); Sleight v. Kingston, 11 Hun, 594; Barton v. Syracuse, 36 N. Y. 54; Bastable v. Syracuse, 8

and ditch constructed, but the action is for damages sustained by reason of the ditch itself, located where it is, for the drainage of the pond, surface water, and sewage, and the injury resulting from the construction of a ditch where this is located, and by reason of its being maintained as an open ditch, and allowing stagnant, corrupt, filthy, and poisonous waters to remain in the same, and obstructing his ingress and egress to and from his premises, and causing the soil of his lot to cave and fall into the ditch, and for which damages the city is liable. *Evansville* v. *Decker*, 84 Ind. 325; *Ross* v. *Thompson*, 78 Ind. 90; *Terre Haute* v. *Hudnut*, 112 Ind. 543, 11 West. Rep. 333; *Wabash, St. L. & P. R. Co.* v. *Farver*, 111 Ind. 195, 9 West. Rep. 621.

A city has general supervision of the drainage of the city, and is liable for defective plans for drainage. If a city adopt a proper plan of drainage, and let a contract for the doing of the work and construction of the drain, the contractor to use his own method and means for the construction of the drain, and damages result by reason of the negligence of the contractor in doing the work, the city would not be liable; but when the city adopt a plan of sewerage or drainage, and contract for its construction, and it is constructed in accordance with the plan so adopted by the city, and injury is caused to a property owner by reason of the negligence of the city in devising the plan and the construction of improper drainage creating a nuisance, obstructing private ways or public ways in which the property owner has a special interest, the city is liable. And the answer in this case does not aver but that the contractor did the work and constructed the drain on the line and in the manner which the city directed and contracted it should be constructed, nor does it controvert the fact that the city has maintained it in such manner, nor that all the injuries resulted to the plaintiff which are alleged in the complaint. Indeed it controverts no averment of the complaint, but seeks to avoid liability on the ground that the ditch was constructed under a contract with one Bartlett. A city cannot avoid liability in this way. The paragraph of answer is bad, and the demurrer was properly sustained. Wood, Mast. and S. p. 605, § 313; Wood, Nuis. 81.

The court also sustained a demurrer to the sixth paragraph of answer, which ruling is assigned as error. The sixth paragraph alleges that in 1872 one Charles Butler was the owner of said real estate described in the complaint, and for a valuable consideration mortgaged the same to the Northwestern Mutual Life Insurance Company, and that said mortgage had been foreclosed, and said land sold, and deed issued for the same, long after the commencement of this suit. There was no error in sustaining the demurrer. It would not affect the right to recover if, after the commencement of this action, he had sold and conveyed the real estate. The action is for injury sustained to the real estate, rendering it less valuable, and it is not necessary that he should retain the title until after the rendition of the judgment. It may have been by reason of the real estate having been rendered untenantable by the injury to the same that caused him to dispose of it, or suffer it to be taken on foreclosure of the mortgage. It is a cause of action accruing to the owner for consequential damages for injury to his real estate, and the damages accrue to the person owning the land at the time of the injury.

The next alleged error is the overruling of appellant's demurrer to the amended second paragraph of reply. The second paragraph of reply is a reply to the third paragraph of answer, which is a paragraph of answer substantially the same as the fifth, and the reply alleges that the digging of the ditch and the

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Hun, 587; Beach v. Elmira, 22 Hun, 158; Rochester White Lead Co. v. Rochester, 3 N. Y. 466; Perry v. Worcester, 6 Gray, 544; Ashley v. Port Huron, 35 Mich. 296; Story v. New York Elevated R. Co. 90 N. Y. 122; Seifert v. Brooklyn, *supra*.

A sewer or culvert debouching upon private estates is a nuisance. Noonan v. Albany, 79 N. Y. 470; Byrnes v. Cohoes, 67 N. Y. 204; Sleight v. Kingston, 11 Hun, 594; Beach v. Elmira, 22 Hun, 158; Seifert v. Brooklyn, *supra*.

If a culvert were dug across a street, whereby the surface water from the lands of adjacent proprietors was gathered, charged with the filth of sinks, and thrown upon the land of another, producing noxious scents and sickness, and rendering the enjoyment of her property impossible, the city would be liable for damages. Smith v. Atlanta, 75 Ga. 110.

It incurred a duty, having created the necessity for its exercise and having the power to perform it, of adopting and executing such measures as should abate the nuisance and obviate damage. Phinizy v. Augusta, 47 Ga. 263; Byrnes v. Cohoes, 67 N. Y. 204; Seifert v. Brooklyn, *supra*.

Liable for collecting and precipitating surface water.

A city is liable if it undertakes to collect water in one channel and wrongfully pours it upon another's land. Lipes v. Hand, 2 West. Rep. 314, 104 Ind. 503; Evansville v. Decker, 84 Ind. 325. 43 Am. Rep. 86; Weis v. Madison, 75 Ind. 241, 39 Am. Rep. 135; Cairo & V. R. Co. v. Stevens, 73 Ind. 278; Templeton v. Voshloe, 72 Ind. 134; Rice v. Evansville, 6 West. Rep. 244, 108 Ind. 7.

This principle has been uniformly applied to the acts of such corporations in constructing streets, sewers, drains and gutters, whereby the surface water of a large territory which did not naturally flow in that direction was gathered into a body and was precipitated upon the premises of an individual, occasioning damages thereto. Byrnes v. Cohoes, 67 N. Y. 204; Bastable v. Syracuse, 8 Hun, 587, also in 72 N. Y. 64; Noonan v. Albany, 79 N. Y. 475; Beach v. Elmira, 22 Hun, 158; Field v. West Orange 36 N. J. Eq. 120, S. C. on appeal, 29 Alb. L. J. 397; Wood, Nuis. § 752; Seifert v. Brooklyn, 2 Cent. Rep. 138, 101 N. Y. 136.

A municipal corporation has no greater right than an individual to collect the surface water from its lands or streets into an artificial channel and discharge it upon the lands of another; nor has it any immunity from legal responsibility for creating or maintaining nuisances. Weet v. Brockport, 16 N. Y. 161, 172, *note;* Byrnes v. Cohoes, 67 N. Y. 204; Haskell v. New Bedford, 108 Mass. 208; Atty-Gen. v. Leeds Corp. L. R. 5 Ch. 583; Seifert v. Brooklyn, *supra*.

A municipality is liable for the flooding of private property by an insufficient sewer, provided it had notice of the defect. Harrigan v. Wilmington (Del.) 11 Cent. Rep. 251; Hitchins v. Frostburg, 10 Cent. Rep. 539, 68 Md. 100.

construction of the same, including the depositing of the earth taken from the same, were done by the contractor in the exact manner contracted for by the city, specifically stating that it was constructed on the line and in the manner directed and as contracted by the city that it should be done, and is the same work described in the complaint, and that it was accepted by the city, and has ever since been maintained by it in the same manner, and that the injuries complained of resulted therefrom. There was no error in overruling the demurrer to this paragraph of reply. The paragraph of answer to which it is addressed is bad for the reason we have given in passing upon the fifth paragraph of answer, and a bad reply is good to a bad answer; but the reply is good, even if the paragraph of answer had contained allegations which would have made it sufficient.

Appellant offered in evidence the transcript of the proceedings and judgment of the court in the foreclosure suit upon which said real estate was sold, which was objected to, and objection sustained, and the evidence excluded, and the ruling of the court is assigned as a cause for new trial. This ruling of the court was correct. The judgment of foreclosure was rendered long after the commencement of this suit, and it was not competent as evidence on the trial of this cause.

Some other errors are assigned on account of the rulings of the court in the exclusion of evidence which are stated as causes for new trial. While they are not properly referred to and stated in the appellant's brief, yet we have examined the questions presented by the rulings, and we think there was no error committed for which the judgment should be reversed, and we do not deem it proper to extend this opinion by making a detailed statement of each. We find no error in the record.

Judgment affirmed, with costs.

Berkshire, J., took no part in the decision of this case.

UNITED STATES CIRCUIT COURT, EASTERN DISTRICT OF MISSOURI.

UNITED STATES
v.
Gustavus KOCH.

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

The United States Act of 1876, imposing penalties for infringement of trademarks, fell with the decision of the Supreme Court of the United States that the Act of 1870, to which it referred, was unconstitutional. *U. S. v. Steffens*, 100 U. S. 82 [25 L. ed. 550]. Such Act of 1876 was not vivified or given operative force by the Act of 1881 in reference to trademarks.

(September 27, 1889.)

ON demurrer to an indictment under the Trademark Statutes of the United States, brought against defendant in the United States Circuit Court of the Eastern District of Missouri. *Sustained.*

The case is stated in the opinion.

Messrs. **George D. Reynolds,** *U. S. Atty.*, and **Warwick M. Hough,** for plaintiff:

Since Congress has the power to regulate certain kinds of commerce, it has the power to regulate trademarks, that are to be applied or used in that kind of commerce.

Webster says a trademark is "a distinguishing mark or device, used by a manufacturer on his goods or labels, the legal right in which is recognized in law."

Worcester says it is "a particular mark, sign, device, writing or ticket, put by a manufacturer upon his goods to distinguish them from those of others."

Browne, Trademarks, 2d ed. § 130.

As was said by *Chief Justice* Marshall in the leading case of *Gibbons v. Ogden*, 22 U. S. 9 Wheat. 192 (6 L. ed. 23): "Commerce undoubtedly is traffic, but it is something more, it is intercourse. It describes the commercial intercourse between nations in all its branches, and is regulated by prescribing rules for carrying on that intercourse. It has been truly said that commerce, as the word is used in the Constitution, is a unit, every part of which is indicated by the term."

It has been repeatedly held, and particularly so in *Gibbons v. Ogden*, *supra*, and *United States v. Coombs*, 37 U. S. 12 Pet. 72 (9 L. ed. 1004), that the power to regulate commerce is a plenary power and with Congress alone lies the choice of means.

Since Congress has the right to provide for the registration of trademarks to be used in commerce with foreign nations or the Indian tribes it has the right to protect that trademark absolutely. To hold otherwise is to hold that the power conferred is not plenary; and power to make such laws is expressly given by cl. 18, § 8, art. 1, of the Constitution.

McCulloch v. Maryland, 17 U. S. 4 Wheat. 316 (4 L. ed. 579).

"Congress must possess the choice of means, which shall be necessary and proper to carry into execution the powers vested by the Con-

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NOTE.—*Violation of trademark.*

Where defendant and complainants below were citizens of the same State, and the bill did not allege that the trademark in controversy was used on goods intended to be transported to a foreign country (Act March 3, 1881, chap. 138, § 11; 21 Stat. at L. 502), the circuit court had no jurisdiction. Ryder v. Holt, 128 U. S. 525 (32 L. ed. 529).

Trademark, appropriation of. See Cigar Makers Prot. Union No. 98 v. Conhaim (Minn.) 3 L. R. A. 125, *note;* Rumford Chemical Works v. Muth, 1 L. R. A. 44, *note;* Coats v. Merrick Thread Co. 1 L. R. A. 616, *note;* Menendez v. Holt, 128 U. S. 514 (32 L. ed. 526); Stachelberg v. Ponce, 128 U. S. 686 (32 L. ed. 569); Liggett & M. Tobacco Co. v. Finzer, 128 U. S. 182 (32 L. ed. 395); Partridge v. Menck, 2 Barb. Ch. 101, 5 L. ed. 572; Bell v. Locke, 8 Paige, 75, 4 L. ed. 350, 351; Snowden v. Noah, Hopk. Ch. 347, 2 L. ed. 446.

5 L. R. A.

See also 5 L. R. A. 599, 614; 6 L. R. A. 839.

stitution in the general government, or in any department or officer thereof."

U. S. v. *Fisher*, 6 U. S. 2 Cranch, 358 (2 L. ed. 304).

The indictment is good in matter of form. It is a statutory offense in the words of the statute.

U. S. v. *Henry*, 3 Ben. 29.

What is necessarily implied need not be substantively alleged.

Gould, Pl. chap. 3, § 6.

The Law of March 3, 1881, is constitutional.

Gibbons v. *Ogden*, 22 U. S. 9 Wheat. 192 (6 L. ed. 23); *U. S.* v. *Coombs*, 37 U. S. 12 Pet. 72 (9 L. ed. 1004); *Trademark Cases* (*U. S.* v. *Steffens*) 100 U. S. 82 (25 L. ed. 550); Browne, Trademarks, 2d ed. § 281.

The Act of 1876 became operative upon the enactmant of the Law of March 3, 1881.

Browne, Trademarks, 2d ed. §§ 26, 370 *et seq.*; *The Aurora* v. *U. S.* 11 U. S. 7 Cranch, 382 (3 L. ed. 378); *Lothrop* v. *Stedman*, 42 Conn. 583; *Smith* v. *Janesville*, 26 Wis. 291; *State* v. *New Haven & N. Co.* 43 Conn. 351; *Bull* v. *Read*, 13 Gratt. 78, 90, 91.

The Law of 1876 is constitutional.

McCulloch v. *Maryland*, 17 U. S. 4 Wheat. 316 (4 L. ed. 579); *U. S.* v. *Coombs*, 37 U. S. 12 Pet. 72 (9 L. ed. 1004); Browne, Trademarks, § 370 *et seq.*

Mr. **John M. Holmes** for defendant.

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

This is an indictment under the Trademark Statutes of the United States.

The indictment was certified up from the district to this court, and to it there has been filed a demurrer. On the argument of that demurrer many questions were presented. I shall notice but one.

The history of trademark legislation is this: In 1870 Congress passed a statute providing for the registration of trademarks—a statute general in its operation. In 1876 it passed another statute imposing penalties for trespass upon rights obtained by the registering of trademarks Under those statutes indictments were found, and on a certificate of division of opinion between the district and circuit judges, cases came to the supreme court, and in what is known as the *Trademark Case* [*U. S.* v. *Steffens*], reported in 100 U. S. 82 [25 L. ed. 550], the supreme court decided that the Act of 1870 was beyond the power of Congress. It suggested in the opinion that under the "commerce clause" perhaps Congress had the power to legislate with reference to trademarks used in commerce between this country and foreign nations, between the States and with the Indian tribes. Immediately thereafter the Act of 1881 was passed by Congress providing for the registering of trademarks which might be used in foreign commerce and commerce with the Indian tribes. It did not re-enact the Penal Statute of 1876, and the Act of 1881 contains no direct reference to that Penal Statute.

Now the contention of the government is, that although the Act of 1870 had no existence, —never had any, having been declared beyond the power of Congress; and that although by reason of that fact the Penal Statute of 1876 had nothing upon which it could operate,—yet it stood as a valid enactment, suspended in operation until the Act of 1881 providing for trademark registration, when it was vivified and became an Act imposing penalties for trespass upon rights given by the Act of 1881.

In the *Trademark Cases* *Mr. Justice* Miller closed the opinion of the court with some reference to the Penal Statute of 1876, and his language is this: "While we have, in our references in this opinion to the trademark legislation of Congress, had mainly in view the Act of 1870, and the civil remedy which that Act provides, it was because the criminal offenses described in the Act of 1876 are, by their express terms, solely referable to frauds, counterfeits, and unlawful use of trademarks which were registered under the provisions of the former Act. If that Act is unconstitutional, so that the registration under it confers no lawful right, then the criminal enactment intended to protect that right falls with it."

Now that language is general, comprehensive, and if taken in its ordinary meaning and as respecting a matter then rightfully before, and rightfully passed upon by, the supreme court, it is a decision of that court that the Penal Act of 1876 fell with the Civil Act of 1870. But it is contended by counsel that the language does not require such interpretation. That all that was pending, and, therefore, all that was meant to be decided, was that the Penal Act had then no force, nothing to act upon, because the Civil Act which it was passed to uphold had no existence.

Assuming that that is true and that the question has never been considered and decided by the supreme court as now presented,—for the Act of 1881 had not then been passed,—a question arises whether a penal statute can be upheld denouncing trespass upon a merely statutory right, when there is in existence no such statutory right, and when whether there shall ever be depends upon the will of succeeding Congresses. It would not be doubted that, if an Act were passed giving a statutory right and in the same Act was a section imposing penalties for trespass thereupon, when the portion of the Act giving the right fell, the whole statute would fall.

And is the rule any different when the penal provisions are in an independent statute enacted by a subsequent Legislature? Of course statutes having reference to the same subject-matter, though enacted at different times, are to be considered as *in pari materia*, and this is thus laid down by Dwarris in his work on Statutes, page 189: "It is therefore an established rule of law that all Acts *in pari materia* are to be taken together as if they were one law; and they are directed to be compared in the construction of statutes, because they are considered as framed upon one system, and having one object in view. (Citing certain cases.) If one statute prohibit the doing a thing, and another statute be afterwards made, whereby a forfeiture is inflicted upon the person doing that thing, both are considered as one statute." *Stradling* v. *Morgan*, Plowd. 206.

That fits this case. Where the right was created by one statute and the penalty inflicted by a subsequent, they are to be considered as one statute.

But it is said that the first statute never had

any existence. We are to look at this question as if there had been only the Penal Statute enacted. Now if valid, whether such a penal statute has any operative force depends upon subsequent legislation. It cannot be doubted that Congress may legislate with reference to the happening of future events. Its legislation may be prospective and contingent upon future events. In case of a civil war Congress might pass, doubtless, a valid enactment that upon the close of that war certain taxes should be collected. But the condition in this case is not something depending upon outside and probable occurrences; it is a condition depending entirely upon the will of succeeding Congresses. There is no succession of time, no possible change in outward events, that can bring the condition to pass. It is a condition that depends solely upon the succeeding Congress. If such legislation be not absolutely invalid, it is certainly very unfortunate.

Further than that, while the Act of 1870 was a nullity, it must be assumed as a matter of fact that in framing the Act of 1876 the penalties imposed were with reference to the terms of the Statute of 1870. Can it be assumed that Congress would have imposed such penalties upon trespasses upon the registration of trademarks, if the broad, general and comprehensive Act of 1870 had not been supposed to be in force. In this trademark case it was pressed upon the supreme court that, as Congress had power to legislate in reference to trademarks in limited cases, the court should uphold the statute as good in reference to such cases; but it properly answered that it could not assume that if Congress had known that it had no general power, but only in limited cases, it would have passed any Act. So and with more force must it be held that if Congress is legislating in respect to penalties upon the theory that it has general and comprehensive power, it cannot be assumed that it would impose the same penalties provided it knew that it only had a limited and narrow power.

Again, when the Act of 1887 was passed, if Congress had intended that penalty should be imposed for a trespass upon the rights conferred by that statute, or if it had intended that the Act of 1876 should be revivified and operate upon the Act of 1881, it was very easy to say so. Its silence in this respect is cogent evidence that it did not understand or intend that the Penal Statute should be considered a part of present and valid law. And that assumption is strengthened by the fact that it had before it for consideration this passage from the opinion of the supreme court in which it is broadly stated that the Act of 1876 had fallen with the Act of 1870. Whatever may be true as to the full meaning of that decision or as to the general power of Congress to impose penalties for trespasses, upon rights having no existence, it had before it the general affirmance by the court that the Law of 1876 had fallen, and it must be assumed that if it meant that it should stand and be vivified, or that any penalties should be imposed for violations of the Law of 1881, it would have so stated.

These considerations convince me very strongly that the Act of 1876 has, as the supreme court said, fallen with the Act of 1870, and it is as much a dead letter as the Act of 1870, and was not vivified or given operative force by the Act of 1881. Of course in that view of the law the demurrer will be sustained. I have not considered the other questions raised by the demurrer. Expressing my opinion upon this one must not be taken as implying any dissent from the views expressed by my Brother Thayer in the opinion heretofore filed by him.

I have chosen to rest my opinion upon this question of the invalidity of the Act of 1876 because if that be true there can be no remedy by changing the form of the indictment. There being no penal legislation by Congress *there can be no indictment found.*

MISSISSIPPI SUPREME COURT.

LOUISVILLE, NEW ORLEANS & TEXAS R. CO., *Appt.*,
v.
STATE OF MISSISSIPPI.

1. **The Mississippi Statute** of March 2, 1888, § 1, requiring all railroads (other than street railroads), carrying passengers, to provide equal but separate accommodations for the white and colored races by providing two or more passenger cars for each passenger train, or by dividing the cars by a partition, is not invalid, as an interference with interstate commerce, as it refers only to the carriage of passengers between points within the State.
2. **The above Act was not repealed** by the Act of March 14, 1888, § 3.
3. **Transportation of persons** is as much commerce as transportation of property.

(June 10, 1889.)

APPEAL from a judgment of the Circuit Court of Tunica County, J. H. Wynn, *J.* *Affirmed.*

The defendant company was indicted for omitting and neglecting to provide separate accommodations on its trains for white and colored persons, as required by Act of March 2, 1888. From a judgment of conviction defendant appeals.

The further facts and a copy of the statute appear in the opinion.

Messrs. **W. P. & J. B. Harris** and **Yerger & Percy** for appellant.

Mr. **Miller,** *Atty-Gen.*, for the State.

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

On the 2d of March, 1888, the Legislature of this State passed an Act entitled "An Act to Promote the Comfort of Passengers on Railroad Trains," which is as follows: "Section 1. That all railroads carrying passengers in this State (other than street railroads) shall provide equal but separate accommodations for the white and colored races, by providing two or

more passenger cars for each passenger train, or by dividing the passenger cars by a partition so as to secure separate accommodations.

"Sec. 2. That the conductors of such passenger trains shall have power, and are hereby required, to assign each passenger to the car, or the compartment of a car (when it is divided by a partition), used for the race to which such passenger belongs, and should any passenger refuse to occupy the car to which he or she is assigned by such conductor, said conductor shall have power to refuse to carry such passenger on his train, and for such refusal neither he nor the railroad company shall be liable for any damages in any court in this State.

"Sec. 3. All railroad companies that shall refuse or neglect, within sixty days after the approval of this Act, to comply with the requirements of section one of this Act, shall be deemed guilty of a misdemeanor, and shall, upon conviction in a court of competent jurisdiction, be fined not more that five hundred dollars, and any conductor that shall neglect or refuse to carry out the provisions of this Act shall, upon conviction, be fined not less than twenty-five nor more than fifty dollars for each offense."

On the first day of August, 1888, the appellant was indicted in the Circuit Court of Tunica County for failure to comply with § 1 of the Act above, and in defense pleaded that it owned and operated a continuous road running from the City of Memphis, in the State of Tennessee, through and across the State of Mississippi and to the City of New Orleans, in the State of Louisiana, carrying on its passenger trains passengers of both the white and colored races from Memphis and other points in the State of Tennessee destined to New Orleans and other points in the State of Louisiana, and other States in the United States, and so carrying passengers of both races from New Orleans and other points in the State of Louisiana destined to Memphis, Tennessee, and other points in the State of Tennessee, and elsewhere throughout the United States; "that it doth now, and hath at all times, and on all occasions, provided equal but not separate accommodations for passengers of the white and colored races; that to provide separate accommodations for the two races would greatly increase the cost of carrying the interstate passengers aforesaid, and greatly hinder, delay, and obstruct the defendant in making its interstate connections with other carriers of passengers, and that it hath not since long prior to the first day of May, 1888, carried any passengers in the County of Tunica, or within the limits of the State of Mississippi, save only upon its trains regularly engaged and operated in the interstate carriage of passengers aforesaid, and in all instances actually carrying such interstate passengers; the right, privilege and immunity of doing which, free from any governmental regulation or control thereof, save by the Congress of the United States, the defendant doth plead and claim under article 1, § 8, of the Constitution of the United States, and this the defendant is ready to verify; wherefore," etc. To this plea a demurrer was interposed by the State, which was sustained by the court, and thereupon, a plea of not guilty being filed, there was trial and conviction, and the defendant appeals.

It is assumed by counsel for appellant that the Act under consideration was intended to regulate, not only the transportation of passengers taken up and set down within the State but those taken up within the State to be carried without, those taken up without to be brought within, and those taken up without to be carried across the State and into other States. An examination of the record shows that the omission for which the indictment was found was the neglect to provide the "separate" accommodations required by § 1 of the Act, and not for failing to assign to such separate car or compartment interstate travelers upon appellant's train. We are not, therefore, called upon to determine whether the legislation in question would be valid if applied to persons other than those taken up within the State to be set down within it.

Confining our attention to the question necessarily involved, it being also the distinct issue presented by the plea of the company, the inquiry is whether the State is precluded from requiring separate accommodations for purely domestic travelers of different races, because to furnish the same would impose a burden upon the carrier, or because the requirement affects interstate travel upon the trains of the company. Upon this question, this court sustains the relation of an inferior tribunal, and, without regard to the opinions of its members, must conform to the decisions of the Supreme Court of the United States, by which court only can an authoritative decision be made. Without attempting to argue for or against any conclusions reached by that court, we shall endeavor only to deduce from them the principles proper to be applied to the decision of the question involved.

The development of an immense interstate commerce, with its incidental multitude of phases and ramifications, has disclosed to the generation of this day the magnitude of the power delegated to the federal government by that clause of § 8, art. 1, of the Constitution by which Congress is given power "to regulate commerce with foreign nations and among the States, and with the Indian tribes." It is not surprising that the recognition of its extent has been of gradual growth in the court called upon to construe it, nor that in judicial utterances there have been inconsistent and conflicting expressions. It does not lie within our province to point out or criticise real or supposed inconsistencies, but taking the more recent decisions of that court, where they have limited or overruled prior cases, to apply the principles, as we understand them to be now announced, to the cause before us. But it does not follow that we are to treat decisions not clearly overruled as no longer binding because remarks are to be found in later cases which, somewhat extended, may be thought to be applicable to the facts here involved.

We consider it to be settled, as stated by counsel for appellant, that transportation of persons is as much commerce as transportation of property, and as a corollary, that the interstate transportation of persons is interstate commerce, and that the State may not regulate such commerce, since it is national in char-

acter, and requires uniformity of regulation. It may also be conceded that absence of legislation by Congress on the subject is indicative of its will that such commerce shall be free and untrammeled. The question returns, whether the Act under consideration is a regulation of interstate commerce, and upon its solution hinges the controversy. The cases of *Hall* v. *De Cuir*, 95 U. S. 485 [24 L. ed. 547], and *Wabash, St. L. & P. R. Co.* v. *Illinois*, 118 U. S. 557 [30 L. ed. 244], are relied upon as decisive against the validity of the statute. We do not so understand them. *Hall* v. *De Cuir* was a case in which the validity of a statute of the State of Louisiana was involved. The statute in effect required all persons engaged within that State in the business of common carriers of passengers to admit all persons traveling on the conveyance employed in the business to equal privileges in all parts of the conveyance without discrimination on account of race or color, and a right to recover actual and exemplary damages was given to any person injured by the refusal of the carrier to comply with the law. De Cuir, a passenger from one point to another within the State, was refused access to the cabin reserved for white passengers on a steamer engaged in interstate business on the Mississippi River, and brought suit against the owner of the boat to recover damages. The statute was held unconstitutional by the Supreme Court of the United States, as being a regulation of interstate commerce. As observed by this court in *Stone* v. *Yazoo & M. V. R. Co.* 62 Miss. 607, the State of Louisiana had no relation to or control over the instruments by which the commerce was conducted. It was an attempt to regulate an interstate carrier, acting under license from the United States and plying the navigable waters of the same. The State had no control over the way, the boat, or the owner. It was an attempt to regulate that which it did not create or license, and which it might neither control nor destroy.

The language of the court, as applied to the facts of this case, is compatible with a liberal exercise by the State of power over its own corporations, which live and move and have their being by virtue of its laws. It is urged, however, that in *Wabash, St. L. & P. R. Co.* v. *Illinois*, *supra*, it has been held equally incompetent for the State to regulate interstate commerce conducted over artificial ways created by the State, or under its authority, as to regulate commerce on the navigable waters of the United States. In that case the only question presented or decided was whether a state statute, controlling the rates to be charged by the common carrier for transportation of freight within the State could be applied to a contract for continuous transportation from a point without to a point within the State. It was held that it could not, since the contract was for interstate commerce, and as such not within state regulation or control. In delivering the opinion of the court, Miller, *J.*, reviews the cases of *Munn* v. *Illinois*, 94 U. S. 114 [24 L. ed. 77]; *Chicago, B. & Q. R. Co.* v. *Iowa*, 94 U. S. 155 [24 L. ed. 94]; and *Peik* v. *Chicago & N. W. R. Co.* 94 U. S. 164 [24 L. ed. 97], and declares much that was said in them to have been decided without sufficient consideration. His criticism of those cases was, however, confined to so much thereof as affirmed the right of the State, in the absence of legislation by Congress, to regulate the transportation of property or persons from points within to points without the State.

We are not warranted in extending the effect of the decision so as to include denials of the right of the State to regulate domestic transportation, though conducted by carriers engaged in interstate commerce. Indeed, the express language of the court excludes such conclusion, for the majority opinion declares that "if the Illinois statute could be construed to apply exclusively to contracts for a carriage which begins and ends within the State, disconnected from a continuous transportation through or into other States, there does not seem to be any difficulty in holding it to be valid."

The question here is a different one from either of those involved in these cases. It is more nearly akin to that decided in *Stone* v. *Farmers Loan & Trust Co.* 116 U. S. 307 [29 L. ed. 636], in which the right to regulate domestic commerce was considered and upheld. It is a matter of common knowledge that there are, at present, many state commissions for the regulation of state commerce, and one by the general government for the regulation of that between the States. Each occupies a field from which the other is excluded, and each is essential, or deemed so to be, to full control of the commerce of the country. By what authority can the transportation of domestic travelers be controlled if not by that of the State? Congress has no jurisdiction over the subject, it being confined to commerce "with foreign nations, and among the States, and with the Indian tribes." Suppose Congress should deem it advisable to enact a law similar to our statute for the regulation of interstate transportation of passengers, could it be contended that it controlled as to passengers taken up and set down within a State? But how does the statute interfere with interstate commerce, if it be true that it has no application save to those traveling wholly within the State?

It is manifest from the plea that the statute is resisted because it imposes a burden, not on commerce, but upon the carrier. The addition of a car at the state line to each of its trains may impose additional expense on the company, but how it is a burden or obstruction to commerce it is difficult to perceive. We do not know of any decision in which the supposed burden of commerce, easily obviated by the act of the corporation, has been held to invalidate a statute in the interest of the carrier. The United States have no concern with the policy, merely, of domestic state laws. It may be that they are harsh, or unfair, or unjust. Admit it, and what follows? Surely not that they are invalid, but only that they should be repealed by that power having jurisdiction of the subject. It would seem to follow that since the transportation of passengers and of property stand upon the same footing, regulations of property within state limits being valid, regulations touching passengers of the same character, *i. e.*, domestic travelers, are also valid.

We do not think the Act under consideration was repealed by section 3 of the Act of March 14, 1888.

The judgment is therefore affirmed.