THE LAWYERS REPORTS ANNOTATED

BOOK XXXIX

ALL CURRENT CASES OF GENERAL VALUE AND IMPORTANCE, WITH FULL ANNOTATION.
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SUPPLEMENTAL TABLE

OF ALL

CASES REPORTED IN LAWYERS' REPORTS, ANNOTATED,

BOOK 39,

NOT OFFICIALLY REPORTED WHEN THIS BOOK WENT TO PRESS.

(To be "tipped in" in front of regular table, used as a book mark or as data for marking each case. Like tables will be furnished for subsequent volumes as fast as possible.)

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LAWYERS' REPORTS

ANNOTATED.

NEW YORK COURT OF APPEALS.

Elizabeth G. HUGHES, *Appt.*,
v.
COUNTY OF MONROE, *Respt.*

(147 N. Y. 49.)

1. A county is not liable for injuries received by an employee from a defective machine in an asylum which was maintained by the county in discharge of its duty as a political division of the state to care for its insane.

2. The maintenance of a county asylum does not become a private business such that the county is liable for injuries received by employees, by reason of the fact that some revenue is incidentally derived by the county from the sale of surplus farm products and from payments made by those liable for the support of insane persons kept in the asylum.

(October 8, 1895.)

APPEAL by plaintiff from an order of the General Term of the Supreme Court, Fifth

NOTE.—*Liabilities of counties in actions for torts and negligence.*

With but few exceptions counties are not liable for torts or negligence in the condition, use, and management of public institutions. The cases frequently admit that the distinction between liabilities of counties and cities is one without a difference, but nevertheless adhere to the rule. The reasons in the several cases endeavoring to apply or evolve the principle are various, among which are the following: That there is no corporation fund out of which satisfaction could be made; that it is better that an individual should sustain an injury than that the public should sustain an inconvenience; that it is not a body corporate; that it is a voluntary corporation; that it is a subordinate political division of a state; that its action is legislative; that neither the state nor its counties could be sued for trespass of its officers; that counties are instrumentalities of government; that counties partake of the immunities of states; that they should not be liable on the ground of ancient precedent and public policy.

The cases which hold that there is an implied liability against a county maintain this on various grounds, some of which are as follows: Electing to act under a power granted imposes a duty rendering it liable; there is a liability for acts done in the discharge of a self-imposed duty not enjoined by law; compensation must be made for taking property without compensation; where the statute creates a duty to repair the liability is the same as that of a city.

The leading case on this question is Russell v. Devon County, 2 T. R. 661, which has been made more or less the foundation of all the cases denying a liability, although it can hardly be said that the counties in this country at the present time stand on the same footing as quasi corporations in England in 1789.

I. *Injuries to travelers and vehicles.*

a. *By bridges and approaches being out of repair.*

1. *Implied liability.*

In JASPER COUNTY COMRS. *v.* ALLMAN it was held that, under Ind. Rev. Stat. 1881, § 2887, Rev. Stat. 1894, § 3277 (§ 3), providing that the board of county commissioners shall receive and appropriate donations for the erection and repair of bridges and aid the same when of general importance, providing, however, that if the board of commissioners shall not deem any such bridge of sufficient importance to make an appropriation from the county treasury for the erection or repairs thereof, the trustees of any township may appropriate any part of the road-tax fund for that purpose if they deem it right and expedient, the board of commissioners have no power to appropriate county funds to the repair of a bridge unless they deem it of sufficient importance, and therefore the county was not liable for injuries caused to a traveler by a defective approach to a bridge. It was further held that the board could only cause bridges to be repaired when the road district was

See also 47 L. R. A. 480.

Department, granting a new trial after verdict in favor of plaintiff at the Monroe County Circuit in an action brought to recover damages for personal injuries alleged to have resulted from defective machinery furnished to plaintiff with which to perform work for the defendant. *Affirmed.*

The facts are stated in the opinion.

Mr. **Eugene Van Voorhis,** with *Messrs.* **J. & Q. Van Voorhis,** for appellant:

The defendant is responsible for its negligence.

At the time of the accident in question, the statutes of this state prescribed that each county might sue and be sued in the manner prescribed by law.

1 Birdseye's Rev. Stat. p. 730, § 1.

Police duties are always held to be public duties, performed for the benefit of the whole state, and neither counties nor municipalities, existing under special charters, are liable for acts of omission or commission in the matter of preserving order or confining offenders against the law.

2 Dill. Mun. Corp. 3d ed. § 974, (772); Shearm. & Redf. Neg. § 260; Beach, Pub. Corp. § 745.

Counties, and cities in states which recognize no distinction between the two are liable to action for private nuisance.

Michel v. *Monroe County Supers.* 39 Hun, 47; *Thayer* v. *Boston,* 19 Pick. 511, 31 Am. Dec. 157; *Akron* v. *McComb,* 18 Ohio, 229, 51 Am. Dec. 453; *Rhodes* v. *Cleveland,* 10 Ohio,

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not able to do it by its road work and tax. This case follows the late Indiana cases overruling the former cases, which held there was an implied liability on counties for injuries caused from defective bridges. This decision is in accord with the weight of authority.

In the absence of a statute it is generally held that counties are not liable in an action for damages for injuries caused by bridges being out of repair, although in Iowa, Maryland, and Pennsylvania a contrary rule prevails, as formerly in Indiana, and in some states a provision is made therefor by statute. The cases holding there is no implied liability are as follows:

The leading case on liability of counties for negligence and tort held that the inhabitants of a county were not liable for an injury done to a wagon in consequence of a bridge being out of repair, which ought to have been repaired by the county. It held that no recovery could be had in the absence of a statute imposing liability, distinguishing the cases where a recovery was had under the statute of hue and cry, because in those cases there was a statutory remedy. It was further held that there could be no liability because there was no corporation fund out of which satisfaction could be made; also that the principle of law that where an individual sustains injury by neglect or default of another the law gives him remedy, must give way to the principle that it is better that an individual should sustain an injury than that the public should sustain an inconvenience. Russell v. Devon County, 2 T. R. 667.

In an action against the inhabitants of a county for injuries caused by a defective bridge, naming the county surveyor as defendant, under 43 Geo. III., chap. 59, § 4, providing that the inhabitants of counties shall and may sue for any damages done to bridges and other works, and repair at the expense of such counties respectively, and for the "recovering" of any property belonging to such counties in the name of their surveyor, "and also shall and may be sued in the name of such surveyor, . . . but the surveyor for the time being shall be deemed the plaintiff or defendant in such action . . . provided always, that every such surveyor . . . shall always be reimbursed and paid out of the moneys in the hands of the treasurer of the public stock of such county . . . all such costs and charges as he shall be put unto," which statute was passed fifteen years after the decision of Russell v. Devon County, 2 T. R. 667,—it was held at first that the plaintiff was entitled to recover, but the judgment was arrested on the ground that the words "costs and charges" did not give a liability against the county by an action against the surveyor. It was said that it may be reasonably considered that the legislature supposed there were some cases where the county was liable at common law, and might have execution against it for the damages, though in truth "we believe there are none." It was also said: "It was much pressed that unless the words in question were allowed to have the operation contended for by the plaintiff, it was impossible to give them any at all. The court below felt the pressure of this argument, and attempted to meet it by one or two suppositions which do not entirely satisfy us. But this difficulty, even if it were greater than it appears to us, would not warrant us in giving such effect to these words as the plaintiff requires, creating a new liability clearly without the intention of the legislature, and working injustice at the same time. The judgment of the court below, therefore, will be affirmed." Makinnon v. Penson, 25 Eng. L. & Eq. 457, affirming 18 Eng. L. & Eq. 509.

In Thomas v. Sorrell, Vaughan, 340, it was said that "if a man have particular damage by a foundrous way, he is generally without remedy though the nuisance is to be punished by the King. The reason is, because a foundrous way, a decayed bridge, or the like, are commonly to be repaired by some township, vill, hamlet, or a county who are not corporate, and therefore no action lies against them for a particular damage, but their neglects are to be presented, and they punished by fine to the King. But if a particular person or body corporate be to repair a certain highway, or portion of it, or a bridge, and a man is endamaged particularly by the foundrousness of the way, or decay of the bridge, he may have his action against the person or body corporate, who ought to repair for his damage, because he can bring his action against them; but where there is no person against whom to bring his action, it is as if a man be damaged by one that cannot be known."

So, a county was held not liable for injuries caused by a defective bridge on a public highway where there was no statute imposing liability, in Granger v. Pulaski County, 26 Ark. 37; Barnett v. Contra Costa County, 67 Cal. 77; White v. Bond County, 58 Ill. 297, 11 Am. Rep. 65; Hedges v. Madison County, 6 Ill. 567; Wheatly v. Mercer, 9 Bush, 704; Carter v. Wilds, 8 Houst. (Del.) 14; Brabham v. Hinds County Supers. 54 Miss. 363, 28 Am. Rep. 352; White v. Chowan County Comrs. 90 N. C. 437, 47 Am. Rep. 534; Clark v. Adair County, 79 Mo. 536.

In Clark v. Adair County, 79 Mo. 536, Hannon v. St. Louis County, 62 Mo. 313, was distinguished, as in that case the county was the owner and proprietor of the property it was improving.

And in Wood v. Tipton County, 7 Baxt. 112, 32 Am. Rep. 561, it was held that a county was not liable for failure to keep a county bridge in repair where there was no statute imposing such liability. It was said that a county was declared by statute to be a corporation, but this only meant in regard to contracts and the power to sue and be sued.

And a county was not liable for injuries caused by a defective bridge. It was said that counties

159, 36 Am. Dec. 82; *Proprietors of Locks & Canals* v. *Lowell*, 7 Gray, 223; *Hildreth* v. *Lowell*, 11 Gray, 345; *Haskell* v. *New Bedford*, 108 Mass. 208.

Counties, while they may be exempt for omission to perform public duties imposed upon them as such by the state, are liable for the private wrongs they commit against others to the same extent as private corporations.

It is a ridiculous condition of the law if counties are properly liable for committing nuisances, for infringing patents, and for converting funds, and yet owe no duty to employees for which they can be held responsible.

Hill v. *Boston*, 122 Mass. 358, 23 Am. Rep. 332.

Where a county undertakes other matters than these public functions of government, for its own advantage or emolument, it loses its character as a public corporation, and it becomes liable in regard to those matters, to the same extent and in the same way as a private corporation.

1 Thomp. Neg. p. 618; 1 Shearm. & Redf. Neg. §§ 255–259; Wood, Mast. & S. §§ 462 *et seq.*; *Maxmilian* v. *New York*, 62 N. Y. 160, 20 Am. Rep. 468; *Bigelow* v. *Randolph*, 14 Gray, 543; *Jones* v. *New Haven*, 34 Conn. 1; *Perkins* v. *Laurence*, 136 Mass. 305; *Hannon* v. *St. Louis County*, 62 Mo. 313; *Bailey* v. *New York*, 3 Hill, 531, 38 Am. Dec. 669; *Oliver* v. *Worcester*, 102 Mass. 489, 3 Am. Rep. 485; *People* v. *Ingersoll*, 58 N. Y. 29, 17 Am. Rep. 178.

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are only quasi corporations created for the purpose of government, and their functions are political and adminstrative, and their powers are rather duties imposed than privileges granted, while cities are chartered for the private advantage of their citizens, and that some courts hold that counties are but political subdivisions of a state, and a suit would be in effect a suit against the state, but, whatever the distinction may be, cities are liable, but counties are not. Heigel v. Wichita County, 84 Tex. 392.

And a county was not liable for injuries caused by defects in a bridge in the absence of any statute imposing such liability, as counties are only quasi corporations. Heigel v. Wichita County, 84 Tex. 392.

So a county was not liable for injuries caused by a county bridge being out of repair. It was held that counties were not liable at common law for injuries caused in this manner, and the statute in force at the time of the alleged injury (1876) did not change the common-law rule. It was said that a county is not, in the proper sense of the word, a municipal corporation. Woods v. Colfax County Comrs. 10 Neb. 552.

And a parish is not liable for private injuries caused by the ruinous condition of one of the parish bridges on a highway where there is no remedy given by statute. King v. Police Jury, 12 La. Ann. 858.

In King v. Police Jury, 12 La. Ann. 858, the case of Houston v. Police Jury, 3 La. Ann. 566, was distinguished, as in the absence of a statute requiring a bridge to be built or to be kept in repair the liability is different from the liability of municipal corporations for the injurious acts of their agents done in the proper scope of their employment, which was the case in 3 La. Ann. 566.

And a county is not liable for injuries occasioned through the negligence of county officers in the construction and repair of county bridges, there being a distinction between cities and counties, as the first are compact and have officers empowered to act promptly, while it is almost impossible for counties covering a large area to provide against defects in highways and bridges. El Paso County Comrs. v. Bish, 18 Colo. 474.

In El Paso County Comrs. v. Bish, 18 Colo. 474, it was said that an implied liability is recognized in Iowa, Maryland, Indiana, and Pennsylvania from the failure of county officers to perform a statutory duty, but the weight of authority is *contra*.

And where a bridge was out of repair, but the delay in repairing was unavoidable, and the plaintiffs attempted to ford a creek, and lost his horse by drowning, the county was not liable. It was further held that if plaintiff attempted to cross a ford when it was apparent that it was dangerous, the defendants would not be liable for failure to give notice. The court said that it has not been usual, nor is it necessary, to give notice when the streams are "up," and "besides, it would have been contributory negligence on the part of the plaintiff to venture to cross a stream so swollen." Jackson v. Greene County Comrs. 76 N. C. 282.

So, the justices of a county were not liable for injuries caused by the breaking of a bridge which was admitted to be dangerous, and known to be so by the magistrates, who made a contract to have the same repaired as soon as they were aware of its condition, but the contractor had neglected to repair the same. It was said that the remedy for a bridge being out of repair is by mandamus, and that there was no liability created by any statute. Kinsey v. Jones County Magistrates, 8 Jones, L. 186.

And a county was not liable for injuries caused by neglect in keeping a bridge in repair where there was no statutory liability, although the statute imposed on the boards of county commissioners the duty of keeping in repair the bridges. Bailey v. Laurence County, 5 S. D. 393.

In Bailey v. Laurence County, 5 S. D. 393, it was said that counties are made corporations for civil and political purposes, but with limited powers; and while it is true that the legislature has imposed upon them the duty of keeping in repair all bridges on public highways, and provided the method, yet to hold that counties are thereby liable for injuries caused by defects in bridges in the absence of legislation would be a species of judicial legislation.

And where an action was brought against the supervisors of a county on a warrant issued for damages caused by the breaking of a bridge on a county road, which warrant had been refused payment, it was held that there was no liability under Cal. Code 1883, § 7, providing that all supervisors, or any officer, authorizing, auditing, or allowing any claim in violation of any of the provisions of this act shall be liable in person to the person damaged to the extent of his loss. It was held that neither the original holder of the warrant nor his assignee had any claim, as the warrant was invalid. Bank of Santa Cruz County v. Bartlett, 78 Cal. 301.

And for injuries caused by failure to repair a bridge the county was not liable under Cal. act March 28, 1855, creating a board of supervisors and giving them the management and control of bridges, and act April 28, 1855, concerning roads and highways, and imposing upon the overseers of the county the duty of keeping bridges on public highways in repair. The remedy, if any, for injuries resulting from neglect to keep such bridges in repair is against the road overseers or supervisors personally. Huffman v. San Joaquin County, 21 Cal. 426.

So, a county was not liable for injuries from a defective bridge in the absence of a statute, and it was held that Cal. Stat. 1875-76, p. 237, § 50, providing that a county is responsible for providing and keeping in good repair bridges, did not create any

The defendant was conducting a private business in connection with the care of its own pauper insane. Under the authorities this renders it liable to the same extent as a private individual.

Neff v. *Wellesley*, 148 Mass. 493, 2 L. R. A. 500; *Oliver* v. *Worcester*, 102 Mass. 489, 3 Am. Rep. 485; *Worden* v. *New Bedford*, 131 Mass. 23; *Tindley* v. *Salem*, 137 Mass. 172; *Eastman* v. *Meredith*, 36 N. H. 285.

There is no ground for claiming that the warden of this asylum was an independent officer, over whom the defendant had no control.

2 Dill. Mun. Corp. 3d ed. § 974 (772); *New York & B. Sawmill Lumber Co.* v. *Brooklyn*, 71 N. Y. 584; *Appleton* v. *New York Water Comrs.* 2 Hill, 483; *Bailey* v. *New York*, 3 Hill, 531, 38 Am. Dec. 669.

The factory law in force at the time of this accident required manufacturing establishments to provide safe mechanical contrivances for the purpose of throwing on and off belts or pulleys. It also provided that machinery of every description in such manufactories shall be properly guarded.

Laws 1890, chap. 398, § 12; *Knisley* v. *Pratt*, 75 Hun, 323; *Cobb* v. *Welcher*, 75 Hun, 283.

Messrs. **Parker, Drake, & Parker,** for respondent:

Counties are under no liability in respect of torts, except as imposed (expressly or by necessary implication) by statute.

2 Dill. Mun. Corp. 4th ed. § 963; Addison, Torts, Banks & Bros.'s ed. p. 1298, § 1526; *Maxmilian* v. *New York*, 62 N. Y. 160, 20 Am. Rep. 468; *Ensign* v. *Livingston County Supers.*

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liability, as the act did not say the county shall be responsible in damages for the failure to keep the bridges in repair. Barnett v. Contra Costa County, 67 Cal. 77.

And a county was not liable for injuries caused from a defective bridge on a highway, under Miss. Rev. Code, arts. 12-14, 17, 18, 21, providing that boards of county police are charged with the duty of making provisions for the building of bridges, making roads and keeping them in repair in their respective counties, and of dividing the public roads into convenient districts, and of appointing one overseer for each district. Sutton v. Carroll County Bd. of Police, 41 Miss. 236.

In this case it was said that under Rev. Code, 600, art. 162, making it the duty of the overseer to keep the roads in his district in good repair, and Rev. Code, 178, art. 38, providing that the board of police shall contract for building and keeping in repair any bridge which the overseer of the road cannot conveniently make with the labor of the hands under his charge, the action would lie against the overseer or contractor.

And the county of St. Louis was not liable for negligence in not keeping a bridge in repair upon a public road. Reardon v. St. Louis County, 36 Mo. 555. This case was distinguished in Hannon v. St. Louis County, 62 Mo. 313.

So, where injuries were caused by the failure to keep a bridge in safe condition upon a public highway the county was not liable. It was also held that Mo. Const. art. 2, § 21, providing that private property shall not be taken or damaged for public use without just compensation, did not apply. Pundman v. St. Charles County, 110 Mo. 594.

In Pundman v. St. Charles County, 110 Mo. 594, it was said that Chester County v. Brower, 117 Pa. 647, which held that a county was liable where the plaintiff's property was damaged by the erection of the abutments of a bridge some 14 feet above the grade of the street in front of his house, and which held that municipal corporations shall make just compensation for property taken, injured, or destroyed by the construction of their highways or improvements, did not furnish any support to this action.

And a county was not liable in damages for injuries caused by defects in a bridge arising from the neglect of the county to maintain it, under N. Y. Laws 1837, chap. 388, § 9, providing that in case a bridge of a certain chartered company shall be impassable for the term of fifteen days, or taken down for the purpose of being rebuilt, or if the same shall not be rebuilt within eighteen months, the bridge shall thereupon become a public bridge, and may be maintained at the expense of the county of L. Ensign v. Livingston County Supers. 25 Hun, 20.

Under N. Y. Laws 1892, chap. 686, declaring counties to be municipal corporations, an action could not be maintained for injuries caused by a defective bridge between two counties, as this statute did not change the liability of counties. Albrecht v. Queens County, 84 Hun, 399; Ahern v. Kings County, 89 Hun, 143.

In MARKEY v. QUEENS COUNTY, where plaintiff's intestate lost his life by a temporary bridge being out of repair while the bridge was being reconstructed between the counties of Queens and Kings, it was held that the board of supervisors were executing a certain public duty imposed upon them as the proper public agents in that particular civil division of the state, and that a county could not be subjected to a private action for injuries occurring in or by reason of the performance of the work. It was further held that N. Y. Laws 1892, chap. 686, providing that a county is a municipal corporation, and that an action to enforce any liability created or duty enjoined upon it or upon any of its officers or agents for which it is liable, or recover damages for any injuries to any property or rights for which it is liable, shall be in the name of the county, did not import any greater liability than that which already existed before the passage of the law.

In Indiana, Iowa, Maryland, and Pennsylvania, counties have been held liable for injuries caused to travelers by bridges being out of repair, under an implied liability, but in Indiana a long line of such cases has been now overruled

Indiana.

In JASPER COUNTY COMRS. v. ALLMAN it was held that a county was not liable for damages caused by negligence of its officers in respect to keeping bridges in repair, in the absence of any statute imposing a liability. In this case all the previous cases in Indiana holding a county liable in such case were overruled, and it was held that counties are instrumentalities of the government, and exercise authority given by the state, and are no more liable for the acts or omissions of their officers than the state.

So, following that case, it is held in Johnson County Comrs. v. Hemphill, 14 Ind. App. 219, Cowan v. Adams County Comrs. 142 Ind. 699, that a county is not liable for injuries caused by the defective condition of an approach to a bridge.

Nor for negligence in permitting the county bridge to become out of repair. Montgomery County Comrs. v. Coffenberry, 14 Ind. App. 701.

But in Park v. Adams County Comrs. 3 Ind. App. 536, under the previous holding of the courts in this state a county was liable for injuries resulting from the negligence of the contractor employed by the county to repair bridges, who failed to place

25 Hun, 20; *Alamango* v. *Albany County Supers.* 25 Hun, 551; *Symonds* v. *Clay County Supers.* 71 Ill. 355; *Hollenbeck* v. *Winnebago County*, 95 Ill. 155, 35 Am. Rep. 151; *Hamilton County Comrs.* v. *Mighels*, 7 Ohio St. 109; *Summers* v. *Daviess County Comrs.* 103 Ind. 262, 53 Am. Rep. 512; *Downing* v. *Mason County*, 87 Ky. 208; *Dosdall* v. *Olmsted County*, 30 Minn. 96, 44 Am. Rep. 185; *Brabham* v. *Hinds County Supers.* 54 Miss. 363, 28 Am. Rep. 352; *Kincaid* v. *Hardin County*, 53 Iowa, 430, 36 Am. Rep. 236; *Sherbourne* v. *Yuba County*, 21 Cal. 113, 81 Am. Dec. 151; *Barnett* v. *Contra Costa County*, 67 Cal. 77; *Crowell* v. *Sonoma County*, 25 Cal. 313; *Reardon* v. *St. Louis County*, 36 Mo. 555; *Pundman* v. *St. Charles County*, 110 Mo. 594.

Even a municipal corporation proper, as a city created by special charter, is not liable for the negligence of its officers and agents, except in relation to a certain class of matters.

Western College of Homeopathic Medicine v. *Cleveland*, 12 Ohio St. 375; *Ulrich* v. *St. Louis*, 112 Mo. 138; *Maxmilian* v. *New York*, 62 N. Y. 160, 20 Am. Rep. 468; *Ham* v. *New York*, 70 N. Y. 459; *Ogg* v. *Lansing*, 35 Iowa, 495, 14 Am. Rep. 499; *Calvell* v. *Boone*, 51 Iowa, 687, 33 Am. Rep. 154; *Blake* v. *Pontiac*, 49 Ill. App. 543; *Buttrick* v. *Lowell*, 1 Allen, 172, 79 Am. Dec. 721; *Wheeler* v. *Cincinnati*, 19 Ohio St. 19, 2 Am. Rep. 368; *Brinkmeyer* v. *Evansville*, 29 Ind. 187; *Toomey* v. *Albany*, 38 N. Y. S. R. 91; *Smith* v. *Rochester*, 76 N. Y. 506; *Hafford* v. *New Bedford*, 16 Gray, 297; *Fisher* v. *Boston*, 104 Mass. 87, 6 Am. Rep. 196; *Pettingell* v. *Chelsea*, 161 Mass. 368, 24 L. R. A. 426; *Howard* v. *Worcester*, 153 Mass. 426, 12 L. R. A. 160; *Finch* v. *Toledo Bd. of Edu.*

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lights or barricades to warn travelers of the danger.

And a county was held liable for negligent omission to keep in a reasonably safe condition the bridges on the public highways. Morgan County Comrs. v. Pritchett, 85 Ind. 68; Pritchett v. Morgan County Comrs. 62 Ind. 210.

And a county was held liable for injuries caused by a defective bridge, in the absence of express statutory liability, under 1 Ind. Rev. Stat. 1876, p. 239, providing that the board of county commissioners shall cause all bridges therein to be kept in repair. House v. Montgomery County Comrs. 60 Ind. 580, 28 Am. Rep. 657.

In House v. Montgomery County Comrs. 60 Ind. 580, 28 Am. Rep. 657, Russell v. Devon County, 2 T. R. 667, was not followed; and it was said that Hamilton County Comrs. v. Mighels, 7 Ohio St. 109, overruled Brown County Comrs. v. Butt, 2 Ohio, 348.

In an action for injuries caused by the breaking down of a bridge from hauling a heavy load over it, evidence that if the bridge had been kept in good repair, as originally built, it would have sustained a much larger load, should have been admitted. Bonebrake v. Huntington County Comrs. 141 Ind. 62.

In Fulton County Comrs. v. Rickel, 106 Ind. 501, it was said that counties are liable for negligence respecting county bridges.

In State, Roundtree, v. Gibson County Comrs. 80 Ind. 478, 41 Am. Rep. 821, it was said that counties are liable for injuries received because of negligence in not making bridges safe for travel.

And a county was held liable, under Ind. Rev. Stat. 1881, § 2892, for injuries caused to plaintiff from defects in a bridge, where she and her husband, a good and careful teamster, were driving. It was further held that an allegation that the bridge was on a public highway leading into a city, at or near the city limits on the south side of the city, showed that the bridge was not within the city, and that it was the duty of the county to keep it in repairs. So it was held that Ind. Rev. Stat. 1881, § 2892, Rev. Stat. 1894, § 3282, providing that the township superintendent shall place a warning against fast driving at the end of any bridge in his district whose chord is less than 25 feet, does not relieve the county from repairing a bridge which was less than 25 feet. It was also held that the allegation that the bridge was constructed by the county avoided the presumption that it was a township bridge. Jackson County Comrs. v. Nichols, 139 Ind. 611.

And under Ind. Rev. Stat. 1881 (Acts 1855, p. 18, § 11), providing that the board of commissioners of such county shall cause all bridges therein to be kept in repair, a county was held liable for injuries caused by negligently suffering a bridge to remain out of repair, although such action was not authorized expressly by statute; and the county could not escape liability by showing that the bridge had been built, repaired, and maintained by township officials alone, and had never been recognized as a county bridge by the commissioners, where it was erected upon and part of a public highway over which the board of commissioners had exclusive dominion. Vaught v. Johnson County Comrs. 101 Ind. 123.

And a county was held liable in Gibson County Comrs. v. Emmerson, 95 Ind. 579, for negligence in not keeping a bridge in proper repair whereby a party was injured. It was held that 1 Ind. Rev. Stat. 1876, p. 239 (act. March 3, 1855, § 11), providing that the boards of commissioners of the respective counties shall cause all bridges to be kept in repair, continuing in force as Rev. Stat. 1881, § 2892, was not affected by act March 2, 1883, p. 62, providing that the supervisors of roads shall carry into effect all orders of the trustee of the township touching highways and bridges therein, and keep the same in good repair.

And a county was liable for injuries caused through negligence of the county board in suffering a bridge to get out of repair, and this liability was not changed by the act of 1881, providing for the superintendent of roads, or by the act of 1883 in regard to counties. Patton v. Montgomery County Comrs. 96 Ind. 131.

So, evidence of repairs made by the county on a bridge shortly after an accident was competent to show that the bridge was a county bridge, but not for the purpose of showing negligence. Shelby County Comrs. v. Blair, 8 Ind. App. 574.

And where injuries were caused by negligence in failing to keep a bridge on a public highway in repair a county was held liable without regard to the cost of the repairs. It was held that this liability was not relieved by Ind. acts 1883, p. 68, amended by acts 1885, p. 202, § 3, providing that if the probable cost of constructing and repairing any bridge shall exceed $75, the township trustees of the township shall notify the board of commissioners of the necessity of such bridge or culvert; and if, in the opinion of the county commissioners, the public convenience shall require the building or repairing of the same, they shall cause the same to be erected, and the township shall pay $75 of the cost. Sullivan County Comrs. v. Arnett, 116 Ind. 458.

And where injuries were caused by negligence in constructing or maintaining a public bridge a county was liable, and it was not a defense to show irregularities in the proceedings establishing the highway of which the bridge was a part. Knox County Comrs. v. Montgomery, 109 Ind. 69.

80 Ohio St. 37, 27 Am. Rep. 414; *Hill* v. *Boston*, 122 Mass. 344, 23 Am. Rep. 332; *McKay* v. *Buffalo*, 9 Hun, 401, Affirmed 74 N. Y. 619; *Givens* v. *Paris*, 5 Tex. Civ. App. 705; *Whitfield* v. *Paris*, 84 Tex. 432, 15 L. R. A. 783; *Curran* v. *Boston*, 151 Mass. 505, 8 L. R. A. 243; *Benton* v. *Boston City Hospital*, 140 Mass. 13, 54 Am. Rep. 436.

While municipal corporations proper may be liable in cases where counties would not be, still, neither can be held liable for negligence of its officers or agents in the execution of powers conferred for the public good.

The officers are created by the statute, and the officers' powers and duties defined by the statute, and they are public officers, performing public duties by virtue of the statute, and in the performance of those duties are absolutely independent of the board of supervisors. Whether individually they would be liable to a private person for negligence or not, the county certainly cannot be liable therefor.

Ham v. *New York*, 70 N. Y. 459; *Smith* v. *Rochester*, 76 N. Y. 506; *Bamber* v. *Rochester*, 26 Hun, 587; *Curran* v. *Boston*, 151 Mass. 505, 8 L. R. A. 243.

The fact that the asylum received a small sum from the sale of surplus produce, etc., of its farm, is unimportant.

Curran v. *Boston*, 151 Mass. 505, 8 L. R. A. 243; *Alamango* v. *Albany County Supers.* 25 Hun, 551; *People, Society of New York Hospital*, v. *Purdy*, 126 N. Y. 679.

The fact that the plaintiff was an employee at the asylum when she was injured does not affect the question of the county's liability.

Pettingell v. *Chelsea*, 161 Mass. 368, 24 L. R. A. 426.

It is of no materiality whether in fact the asylum derived some slight revenue from pay-

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But a county was not liable for injuries caused from a defective bridge or culvert, where it was not shown over what the bridge spanned, or over what it constituted a passageway; and this was not cured by the averment that "the defendant in its corporate capacity had supervision over, and had control of, the structure." It was further held that the allegation that the plaintiff was without fault was not overcome by an averment that the plaintiff attempted to pass over the bridge with a steam threshing engine. Clark County Comrs. v. Brod, 8 Ind. App. 585.

And where the bridge was within a city, formed one of its streets, and it was not shown that it belonged to the county, or that it was its duty to keep it in repair. Spicer v. Elkhart County Comrs. 126 Ind. 369.

In Goshen v. Myers, 119 Ind. 196, it was said: "It has often been held by this court that it is the duty of the counties in this state to keep their bridges in repair, and that they are liable in damages to those injured, without their fault, for a neglect of that duty. . . . But the county is not liable for a failure to keep in repair bridges over which the board of commissioners has no control."

In Shelby County Comrs. v. Deprez, 87 Ind. 509, it was said that a county was liable for injuries caused by defective approaches to bridges; but in this case the petition failed to show that the bridge was a part of a public highway. As to whether a county could be held liable for a bridge in a city was not decided.

Where the question was as to notice of defects, a county was held liable for injuries caused by the negligent construction of a bridge, and it was no defense that the bridge had been safely used for thirteen years. Where it was shown that the bridge was negligently constructed so as to be unsafe, it was not necessary to allege that the county had notice of its condition. Wabash County Comrs. v. Pearson, 120 Ind. 426.

And in an action against a county for negligence in not keeping a county bridge in repair, it is not necessary to allege that the board of supervisors had notice of the condition of the bridge, and it is no defense that the bridge had been built and maintained by the township, and that they have sufficient means to keep it in repair, as it is the duty of the board of commissioners under Ind. Rev. Stat. 1881, § 2892, and the act of March 2, 1883, did not relieve the county. Allen County Comrs. v. Bacon, 96 Ind. 31.

So, a county was liable for injuries caused by a defective bridge where its proper officers did not exercise reasonable care in ascertaining the condition, and repairing the same. It was held that notice might be inferred where defects existed for such length of time that the county by the exercise of reasonable care could have discovered the same. Howard County Comrs. v. Legg, 110 Ind. 479.

So, a county was liable for the breaking down of a bridge, where it had been built for seven or eight years, and the county had been petitioned to erect a new bridge, the present one being unsafe, the timbers having been placed upon the ground and rotted. The duration of time and manner of structure was held to be notice to the county of its dangerous character. Bonebrake v. Huntington County Comrs. 141 Ind. 62.

And where the county not only negligently used unfit and unsafe material, but during eight years of use and exposure to the elements made no inspection of it, and the defects were of such a character as to be easily discernible on inspection, it was held liable. Allen County Comrs. v. Crevistón, 133 Ind. 39.

So, a county was liable for injuries caused by negligence in not keeping a county bridge in repair. It was held that notice, express or implied, on the part of the county should be shown in order to recover for failure to repair. It was said that a county adopting a bridge erected by others would be bound to the same extent as though it originally constructed it; but that if it was a township bridge the county would not be liable. Howard County Comrs. v. Legg, 93 Ind. 523, 47 Am. Rep. 390.

And a county was liable for injuries caused by failure to keep a bridge in repair, where a horse was frightened by a crooked log placed at the corner of the bridge to keep the earth from washing away, and there was no railing, and it was shown that two members of the county board had crossed the bridge some months before, but had not noticed that there was no railing. It was further held that Ind. Rev. Stat. 1881, § 2892, requiring county boards to keep bridges on public highways in repair, was not repealed by act of 1885, and that the duty resting on the county board to repair bridges applied to approaches and railings where the same were needed to make a bridge reasonably safe for travel by those who exercised ordinary care. Sullivan County Comrs. v. Sisson, 2 Ind. App. 311.

Where a county was held liable for injuries from a defective bridge it was further held that it was no defense to show that the plaintiff was driving in the dark. Jackson County Comrs. v. Nichols, 139 Ind. 611.

And where a recovery was had for injuries caused by a bridge being out of repair, and the verdict was that "had the timber in said bridge been sound the same would have carried said load over safely," and the verdict did not show that the

ing patients admitted by agreement made between the warden and individuals.

Benton v. *Boston City Hospital*, 140 Mass. 13, 54 Am. Rep. 436; *Downs* v. *Harper Hospital*, 101 Mich. 555, 25 L. R. A. 602; *McDonald* v. *Massachusetts Gen. Hospital*, 120 Mass. 435, 21 Am. Rep. 529; *Murtaugh* v. *St. Louis*, 44 Mo. 479.

Defendant owed plaintiff no duty in the way of furnishing a finger bar or guard.

Hickey v. *Taaffe*, 105 N. Y. 26; *Sweeney* v. *Berlin & J. Envelope Co.* 101 N. Y. 520, 54 Am. Rep. 722; *Harley* v. *Buffalo Car Mfg. Co.* 142 N. Y. 31; *Sisco* v. *Lehigh & H. R. Co.* 145 N. Y. 296; *French* v. *Aulls*, 72 Hun, 442.

Defendant owed no duty to plaintiff to provide any device for shifting the belt other than was furnished.

Even if it were the duty of defendant to provide safeguards, and the same had been provided, the accident would not have been averted, and whether the injuries to plaintiff would have been different or less severe is merely conjecture.

Pauley v. *Steam Gauge & Lantern Co.* 131 N. Y. 90, 15 L. R. A. 194; *Babcock* v. *Fitchburg R. Co.* 140 N. Y. 308.

The warden was a physician, not a machinist. He was selected for that position, not because of his knowledge of machinery, but because of his knowledge of the proper method of treating the insane. The asylum was primarily a hospital, and the laundry department, like the kitchen department, was but an incident. The rule of duty therefore to be applied in this case is the rule applicable where the master and servant are to be charged with equal knowledge and ignorance.

Marsh v. *Chickering*, 101 N. Y. 396; Thomp. Neg. 1009; *French* v. *Aulls*, 72 Hun. 442; *Benfield* v. *Vacuum Oil Co.* 75 Hun, 209.

The injury sustained by plaintiff resulted

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load was unusual, the deceased was held not guilty of contributory negligence. Allen County Comrs. v. Creviston, 133 Ind. 39.

And the petition stated a cause of action where it alleged the negligent use of defective material in the construction of a bridge, and the failure to keep the same in repair, whereby an engine, boiler, and wagon fell through the bridge, without fault or negligence on the part of plaintiff's intestate, causing his death. It was held that the attempt to cross the bridge with an engine, boiler, and wagon was not negligence *per se*. Allen County Comrs. v. Creviston, 133 Ind. 39.

And it was held that if the county was bound to know of the defective condition of the bridge by reason of the long continuance of such condition this would not charge the deceased, and contributory negligence was not shown by hauling an engine weighing over 11,000 pounds, where the deceased had threshed in that neighborhood for three years, and had used the bridge a few days before, and did not know that it was unsafe, and examined it carefully before attempting to cross. La Porte County Comrs. v. Ellsworth, 9 Ind. App. 566.

And where traction engines were in use in the neighborhood for many years previous to the construction of the bridge, it was held that the bridge was presumed to have been built in anticipation of taking such engines over it. Bonebrake v. Huntington County Comrs. 141 Ind. 62.

So, a county was liable for injuries caused from a defective bridge, although plaintiff had knowledge of the kind of timber of which the bridge was constructed, and of the length of time the timbers had been in the bridge, as he would have the right to assume that the decayed timber would be removed and the defects repaired. Apple v. Marion County Comrs. 127 Ind. 553.

But in Vermillion County Comrs. v. Chipps, 131 Ind. 56, 16 L. R. A. 228, where a man was killed in hauling a traction engine over a bridge, and the bridge had been built for about fifteen years before traction engines were used on highways, and it was tested about two weeks before the accident by the county expert, it was held that if he made a mistake the county cannot be charged with negligence by reason of such mistake. "The duty of the county was to exercise reasonable care in selecting a proper person to examine and repair the bridge, and to require of him the exercise of his skill, and if it did so, and the bridge still remained unsafe, the county was not liable," and it was error to allow the plaintiff to prove that it was usual and ordinary for traction engines to pass over other highways and bridges than the one in controversy, and the fact that one engine had passed over this bridge shortly before this accident did not make that the usual and ordinary mode of travel over it. It was held that one who uses a bridge and subjects the same to an extraordinary strain cannot recover damages.

And a county was not liable for damages for injuries caused by a public bridge being out of repair and dangerous, where the plaintiff knew that such was its condition, although the bridge was being used by the public and plaintiff exercised care in going upon it. Morrison v. Shelby County Comrs 116 Ind. 431.

And it was no defense that the bridge was over an artificial ditch, as the county should keep all bridges upon highways safe regardless of the kind of stream or ditch which they span. Howard County Comrs. v. Legg, 110 Ind. 479.

And a county is liable whether the bridge is on a natural or artificial watercourse. Jackson County Comrs. v. Nichols, 139 Ind. 611.

An in an action for causing death by want of a railing over a county bridge across a mill race on a highway, where the horse shied and there was no railing, an allegation in the complaint that the bridge complained of was constructed at a point "where the defendant had the right to and it was its duty to construct it," was a conclusion, and did not show that the county had authority to build it; but another allegation that the bridge complained of was a part of a public highway in said county, and was situated and located over and across a mill race through which a large quantity of water flowed rapidly, was sufficient to show that it was a county bridge within the meaning of Ind. Stat. 1881, § 2892, providing that the board of county commissioners shall cause all bridges in the county to be kept in repair, and §§ 2880, 2885, authorizing such board to erect bridges over streams and watercourses. Evidence that the county board exercised control over it by looking after and repairing it was competent for the purpose of showing that it had adopted it and considered it a part of the highway. Shelby County Comrs. v. Blair, 8 Ind. App. 574.

And in that case it was held that the law was settled in Indiana that the board of commissioners are required to keep all bridges in the county over watercourses, either natural or artificial, which are part of the highway, and a failure on the part of the county in the performance of this duty renders the county liable to a traveler for damages.

And a county was liable for injuries caused by defects in a bridge over a natural watercourse on a highway, under Ind. Rev. Stat. 1881, § 2892, providing that the board of commissioners of such county

from conditions, the risk of which was assumed by plaintiff when she entered into the employment of operating the mangle.

Hickey v. *Taaffe*, 105 N. Y. 26; *Buckley* v. *Gutta Percha & Rubber Mfg. Co.* 113 N. Y. 540; *Ogley* v. *Miles*, 139 N. Y. 458; *Appel* v. *Buffalo, N. Y. & P. R. Co.* 111 N. Y. 550; *Crowen* v. *Orr*, 140 N. Y. 450; *DeForest* v. *Jewett*, 88 N. Y. 264; *Cowhill* v. *Roberts*, 71 Hun, 127; *French* v. *Aulls*, 72 Hun, 442.

The very accident suggests carelessness on plaintiff's part, and she is bound to prove her freedom from negligence, which, we submit, she has failed to do.

Babcock v. *Fitchburg R. Co.* 140 N. Y. 308.

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

The plaintiff appeals from an order, made on a motion heard at the general term in the first instance, granting a new trial after verdict at the Monroe circuit in her favor.

The plaintiff, an employee of the Monroe County Insane Asylum, was severely injured while operating a machine known as a steam mangle, which was used in the laundry.

At the trial it was insisted on behalf of the defendant that the county of Monroe was not liable in any event; that assuming its liability, the plaintiff had failed to make out a cause of action.

As we are of opinion that the county of Monroe is not liable under the facts as disclosed in this record, it is unnecessary to determine whether the plaintiff was entitled to go to the jury.

The plaintiff was injured February 11, 1891. Before this action was commenced the county law of 1892 was in force, but it is unnecessary

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shall cause all bridges therein to be kept in repair. Parke County Comrs. v. Wagner, 138 Ind. 609.

In Parke County Comrs. v. Wagner, 138 Ind. 609, it was said: "The cases in this state are in confusion upon this question, many apparently holding that the liability arises from the fact that the bridge forms a part of the highway, and not depending upon the size of the bridge or the character of the stream or body of water crossed by it. Sullivan County Comrs. v. Arnett, 116 Ind. 438; Hamilton County Comrs. v. State, Stephenson, 113 Ind. 179; Knox County Comrs. v. Montgomery, 109 Ind. 69; Vaught v. Johnson County Comrs. 101 Ind. 123; Allen County Comrs. v. Bacon, 96 Ind. 31; Gibson County Comrs. v. Emmerson, 95 Ind. 579; Howard County Comrs. v. Legg, 93 Ind. 523, 47 Am. Rep. 390; Madison County Comrs. v. Brown, 89 Ind. 48; Morgan County Comrs. v. Pritchett, 85 Ind. 68; House v. Montgomery County Comrs. 60 Ind. 580, 28 Am. Rep. 657; Harris v. Vigo County Comrs. 121 Ind. 299; Owen County Comrs. v. Washington Twp. 121 Ind. 379, and probably other cases. In Howard County Comrs. v. Legg, 110 Ind. 479, and Boone County Comrs. v. Mutchler, 137 Ind. 140, it was expressly held that the size of the bridge, and the character of the stream or ditch crossed were unimportant if the bridge was a part of the public highway, and liability was extended to bridges crossing ditches for the drainage of wet lands. In Carroll County Comrs. v. Bailey, 122 Ind. 46; Clark County Comrs. v. Brod, 3 Ind. App. 585; Shelby County Comrs. v. Castetter, 7 Ind. App. 309; Shelby County Comrs. v. Blair, 8 Ind. App. 574,—it was held that Rev. Stat. 1881, § 2892 (Rev. Stat. 1894, § 3282), should be construed in connection with other provisions of the statute requiring counties to build and repair bridges, and when so construed the authority of the counties was to build bridges only over watercourses, and the duty of counties was only to repair such bridges as they were authorized to build. The latest decision by this court is that of Boone County Comrs. v. Mutchler, 137 Ind. 140, and if we found it necessary to reconcile the conflict suggested, and to adhere to the holding in that case, it would be unnecessary to decide whether the definitions of a watercourse given by the trial court in this case were correct, since they could in no way have harmed the appellant, but would have required more from the appellee than necessary to establish his cause of action." And the court concludes "The channel should have a supply of living water, though it is not necessary that the supply should be sufficient at all times, or most of the time, to flow the entire length of the channel."

A county was liable for injuries caused by the negligent construction of a bridge over a ditch, under Ind. Rev. Stat. 1881, § 2892, providing that the board of commissioners of such county shall cause all bridges therein to be kept in repair, where plaintiff's horse was frightened by a hog in a ditch on a free gravel road, a public highway, and backed the buggy over the side of the bridge, there being no railing to protect the same. It was held that another allegation that the county negligently permitted the adjoining owner to allow his animals to run in the ditch, thereby frightening the horse, stated no cause of action; but this did not affect the cause of action as to the construction of the bridge, or relieve the county from liability. It was also held that it was not necessary to allege notice where the cause of action arose from faulty construction. It was further held that the fact that the horse was driven by plaintiff's daughter, a married woman who was a skilful driver, did not show contributory negligence. Boone County Comrs. v. Mutchler, 137 Ind. 140.

But in an action for injuries caused by the breaking down of a bridge a demurrer was properly overruled to an answer averring "that the bridge or culvert complained of was not a bridge or structure which spanned a watercourse with defined bed and banks; but was a small bridge or culvert made to carry the surface water from said road away from it after heavy rains," as under a general denial in the answer these facts might be proved. Bonebrake v. Huntington County Comrs. 141 Ind. 62.

A county was not liable for damages resulting from a defective bridge described as one "spanning a ditch which made a deep break in said highway," and "which was a natural outlet for surface water from adjoining lands, and for waters that flowed from under a railroad near by, being dry portions of the year only." Reinhart v. Martin County Comrs. 9 Ind. App. 572.

In Reinhart v. Martin County Comrs. 9 Ind. App. 572, the case of Boone County Comrs. v. Mutchler, 137 Ind. 140, was distinguished, as in that case the ditch was regarded as a public ditch, and it was constructed by the board of commissioners as a part of a free gravel road.

In an action to recover damages for injuries from an unsafe bridge, it must be alleged that the unsafe condition of the bridge was the cause of the injury. An allegation that the bridge was unsafe, and the plaintiff's horse was injured, was held not to show any connection between the two things. Harris v. Vigo County Comrs. 121 Ind. 299.

And a county was liable for negligence in allowing a slab bridge over a pond to remain out of repair, causing injury, and the fact that it was in this condition for six months was sufficient to imply notice. A recovery was not prevented by the fact that plaintiff knew that it was somewhat out

to examine its provisions, as the status of the county of Monroe on the 11th day of February, 1891, must determine its liability.

Prior to the year 1863 the county of Monroe cared in part for its insane in a department of the county poorhouse. By chapter 82, Laws of 1863, it was enacted that the insane asylum of the county of Monroe should be a separate and distinct institution from that of the Monroe county poorhouse, and the board of supervisors were placed in control and authorized to elect a warden, who was to hold office for three years, and a board of three trustees for a like term.

The warden was constituted the chief officer of the asylum, subject to the regulations established by the board of supervisors; all purchases for the asylum were to be made by the warden under the direction of the trustees; all contracts with the attendants and assistants were to be made in the official names of the trustees; the warden was also required to make out and deliver to the trustees annually an inventory of all property belonging to the asylum; the warden was also authorized to make contracts for the support of insane persons of the county, and by the direction of the board of supervisors or the trustees to demand from the state lunatic asylum all persons who were chargeable to the county of Monroe or to any town or city in the county.

It was further provided that no insane person residing in the county of Monroe and likely to become a county charge should thereafter be admitted to the state lunatic asylum without the written consent of the trustees of the Monroe county asylum or the chairman of the board of supervisors.

By chapter 633, Laws of 1870, it was made the duty of the trustees to determine all ques-

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of repair. Madison County Comrs. v. Brown, 89 Ind. 48.

And a county was liable for injuries caused from a defective bridge on a public highway which spanned a watercourse. La Porte County Comrs. v. Ellsworth, 9 Ind. App. 566.

In Parke County Comrs. v. Sappenfield, 10 Ind. App. 609, where a recovery was allowed for negligent failure to erect and maintain suitable railings upon a county bridge, it was held that the evidence was sufficient to authorize the jury to find that the bridge was constructed over a natural watercourse —a "branch," as one of the witnesses styled it.

And a verdict for damages for injuries from failure to erect barriers on a bridge was not set aside on conflicting evidence. Parke County Comrs. v. Sappenfield, 10 Ind. App. 609.

But a county was not liable for damages caused by a defective culvert on a public highway, where such culvert drained water from a ravine only in case of rain, under Ind. Rev. Stat. 1881, § 2885, requiring the county commissioners to repair or build bridges over watercourses. This was held not to be a watercourse, and a distinction was made between the care required for bridges and highways. Carroll County Comrs. v. Bailey, 122 Ind. 46.

Iowa.

In Iowa counties are held liable for failure to exercise care in the construction or repair of county bridges and a notice to any one of the county agents or officers will render the county liable for injuries thus caused. This rule has been limited to bridges of such size as the county should take care of, and does not extend to small bridges.

And a county was liable for injuries caused by a defective bridge. In this case the court recognized that the question was one upon which there was conflict, but refused to change the rule of that state. It was held that the county was bound to exercise such care as reasonably prudent and careful men used in the conduct and management of their own affairs of like importance. Cooper v. Mills County, 69 Iowa, 350.

And in this case where the court instructed the jury, in substance, that if the bridge was properly built, though from a plan in the builder's head, such plan will be sufficient, and a juryman wrote on a paper pinned to that part of the instruction "not sufficient," such writing was held to be only an irregularity, and did not have the force of a special verdict, although perhaps some of the jury may have understood that as an interrogatory.

Where an action was brought for $20,000 damages for injuries caused by a defective bridge, and the petition was amended increasing the claim to $35,000, and the amendment was not filed within two years from the time the cause of action occurred, as required by statute for bringing an action, and the action was brought within the proper time, the amendment was properly allowed, and a recovery could be had for damages within the amount claimed in the petition and amended petition. Cooper v. Mills County, 69 Iowa, 350.

And evidence by an expert bridge builder as to the effect of decay, and the ordinary life of bridge timber, was held competent as tending to show notice to the county of defects, and it was further held that a county should provide a competent person to inspect the bridges if the board had not that skill. Morgan v. Fremont County, 92 Iowa, 644.

A notice to one of the board of supervisors of a county for defects in a bridge is notice to the county, where it is the duty of the board to act, and a meeting of the board is held after the notice and before the accident. Morgan v. Fremont County, 92 Iowa, 644.

A verdict for $1,000 was held not excessive for injuries caused by defective bridges, where plaintiff was lamed, his jaw injured, some teeth broken, and his injuries caused much suffering. Morgan v. Fremont County, 92 Iowa, 644.

A county was liable for negligence in the construction of a bridge, and was required to exercise reasonable skill and care in adopting a plan, and it could not negligently or carelessly adopt an unsafe and insufficient plan on account of its cheapness, and be allowed to escape all liability for damages resulting from the insufficiency of the plan. It was also held that the bridge may have been built so long and become so old that the defendant in the exercise of ordinary care and prudence ought to have known that it would in such time become rotten and unsafe; and, further that if the members of the county board did not possess the requisite skill to discharge the duty of inspection, then it was the duty of the board to appoint or provide someone possessing such skill, and to have all county bridges under their care examined as frequently as a man of ordinary prudence and care would deem necessary for the safety of the public. But it was further held that if the bridge had stood for a period greater than the average life of timber of which it was composed, and had been rotten and unsafe for some months, the county would not be liable unless some member of the board in the exercise of reasonable care should have known of such condition. Ferguson v. Davis County, 57 Iowa, 601.

In Huff v. Poweshiek County, 60 Iowa, 529, it was held that it was a question for the jury whether the county was negligent in allowing bridge timbers

tions in relation to the indigent insane as to whether their maintenance was properly a charge upon a specified town within the county of Monroe, or upon the city of Rochester, or upon the county of Monroe; the trustees were also empowered when any lunatic, not indigent, was placed in the asylum, to charge his estate, or the person legally responsible, for his maintenance, and to collect the same.

It will thus be observed that the county of Monroe, being legally chargeable as one of the political divisions of the state with the care of its insane, saw fit in 1863, with the consent of the legislature, to undertake the discharge of that duty through the instrumentality of a county asylum.

In other words, the county of Monroe from that time shared with the state the burden of caring for the insane, withdrew from the state lunatic asylum all indigent insane for whose maintenance it was liable, and secured legislation requiring all the pauper insane of the county to enter its own asylum.

When an insane person is deprived of his liberty and the custody of his property, placed in close confinement, and separated from family and friends, it is an extreme exercise of the police power by the state, or some political division thereof, for the protection of society and to promote the best interests of the unfortunate victim of mental alienation.

It therefore follows that the county of Monroe, while acting under the statutes referred to, was engaged in the discharge of a most important public duty and, consequently, not liable to the plaintiff in damages by reason of her injuries. 2 Dill. Mun. Corp. 4th ed. § 693; Addison, Torts, Banks' ed. p. 1298, § 1526.

In *Maximilian* v. *New York*, 62 N. Y. 160, 20 Am. Rep. 468, this court laid down the rules of law that control this case. The plaintiff sought to recover damages for the death of her

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to become rotten, and if the bridge was unsafe the county was liable if any member of the board of supervisors knew of its unsafe condition, or by the exercise of ordinary care and watchfulness would have known of it.

In Roby v. Appanoose County, 63 Iowa, 114, it was held that notice to the agents or proper officers of a county of the condition of the approach to a bridge was notice to the county in order to hold it liable for injuries caused thereby.

But it was held that the county was not liable where it was not shown to have had notice of the defect, or that it was of such duration as to imply notice. It was said that a county is liable for injuries caused by a defective bridge which it has neglected to repair, where the railing is insufficient. Davis v. Allamakee County, 40 Iowa, 217.

And where a county had obstructed an unsafe bridge by barriers, which had been removed at the time of the accident without the knowledge of the county, it was not liable unless sufficient time had elapsed after the removal of the same, and before the accident, for the county, in the exercise of ordinary care and vigilance, to have discovered the fact, and to have caused the barriers to be replaced. Weirs v. Jones County, 80 Iowa, 351.

And under Iowa Code, § 527, providing that all public bridges exceeding 40 feet in length over any stream crossing a county street or highway shall be constructed and kept in repair by the county, and § 303, requiring the board of supervisors of each county to provide for the erection of all bridges which may be necessary to keep the same in repair, and § 990, providing that when notified in writing that any bridge or any portion of the public highway is unsafe the supervisor shall be liable for all damages after a reasonable time, and if there is in the district any bridge erected or maintained by the county, then he shall on such notice of the unsafe condition of such bridge obstruct the passage and use diligence in notifying the board of supervisors, and if he fails to obstruct or notify he shall be liable for all damages, providing that nothing shall be construed to relieve the county from liability for the defects of such bridge,—a county was liable for all bridges which exceeded 40 feet in length, and the liability for constructing and maintaining bridges less than 40 feet was not affected by these provisions, but depended upon the necessity and importance to the public and the ability of the road district. The county was liable where there were two spans 20 feet apart, one of which was over 40 feet and the smaller one not more than 40 feet long, and the smaller one was out of repair causing personal injury. Casey v. Tama County, 73 Iowa, 655.

That a bridge was wholly within B. county did not exonerate T. county, under Iowa Acts, 17th Gen. Assem. authorizing the construction of county bridges on county-line roads wholly within one of the two counties interested where a suitable site cannot be obtained on the county line, where the defendant rebuilt the span over the main stream and put piling under the other after this law went into effect. Casey v. Tama County, 73 Iowa, 655.

In this case it was held that it was a question for the jury to determine whether or not the road in question on which was the bridge was a public highway.

A county was liable for injuries caused by defects in a county bridge upon a public highway, where such bridge was erected and maintained by the county. Krause v. Davis County, 44 Iowa, 141; Hughes v. Muscatine County, 44 Iowa, 672.

And was liable for injuries resulting from the negligent construction of a county bridge, and from the failure to keep the same in repair, although it could have been remedied by the road supervisor at a small expense. Huston v. Iowa County, 43 Iowa, 456.

And for injuries caused by a county bridge being out of repair, a county was liable under the Iowa statute making it the duty of the county in which the bridge is situated to build bridges and make all repairs requiring an extraordinary expenditure of money. It was held that this duty involved the corresponding obligation or liability to pay damages for the injuries resulting from the neglect of the same. Wilson v. Jefferson County, 13 Iowa, 181.

And a county was liable for injuries caused by a county bridge being out of repair, and all that was incumbent on the plaintiff was to show that this road existed and was traveled as a public highway in order to bring it within the duty of a county to keep it in repair. It was further held that an obstruction and notice warning the public that it was dangerous to use the bridge would not excuse, where it was not shown that such notice and obstruction existed at the time of the injury or that plaintiff had seen the same. Brown v. Jefferson County, 16 Iowa, 339.

The fact that it was the duty of the road supervisors to make slight repairs about a county bridge or its approach would not relieve the county from liability for injuries caused thereby, as a like obligation rests upon the county under Iowa Code, § 527. Roby v. Appanoose County, 63 Iowa, 114.

In this case it was said that it would be presumed that the bridge was a county bridge where the instructions were based upon that theory, and there was no evidence in the record to the contrary.

But a county is not liable for injuries caused

intestate, who was killed by an ambulance wagon which was driven by an employee of the commissioners of charities and corrections.

It was held that when the city of New York, by legislative enactment, was required to elect or appoint an officer to perform a public duty laid not upon it, but upon the officer, in which it had no private interest, and from which it derived no special advantage, such officer is not a servant or agent of the municipality for whose acts it is liable, even though the officer had in charge and was negligently using corporate property.

Judge Folger said (p. 164, 20 Am. Rep. 470): "There are two kinds of duties which are imposed upon a municipal corporation. One is of that kind which arises from the grant of a special power, in the exercise of which the municipality is as a legal individual; the other is of that kind which arises, or is implied, from the use of political rights under the general law, in the exercise of which it is as a sovereign. The former power is private, and is used for private purposes; the latter is public and is used for public purposes (*Lloyd* v. *New York*, 5 N. Y. 374, 55 Am. Dec. 347). . . . But where the power is intrusted to it as one of the political divisions of the state, and is conferred, not for the immediate benefit of the municipality, but as a means to the exercise of the sovereign power for the benefit of all citizens, the corporation is not liable for nonuser, nor for misuser by the public agents. *Eastman* v. *Meredith*, 36 N. H. 284, 72 Am. Dec. 302."

In the case at bar, it is true, we are not dealing with a municipal corporation, for in February, 1891, the county of Monroe was a political division of the state, and at most only a quasi corporation; but, nevertheless, the reasoning in the opinion just cited is applicable.

By the act of 1863 the county of Monroe, through its board of supervisors, was required

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by a defective bridge, where such bridge is in a town which has been recently changed into a city of the second class, under Iowa Rev. Stat. §§ 1078-1097, providing that cities of the second class shall be invested with the power to control its own bridges and charged with the duty of keeping them in repair. McCullom v. Black Hawk County, 21 Iowa, 410. But this case was remanded for a new trial with leave to amend, if possible, to show that at the time the accident happened there had been no regular annual election for the city officers as a city of the second class, as the county would then be liable.

And a county was not liable for a defective bridge where the same was a small bridge, 12 feet span, and a complete and safe bridge with railings could have been built for $75, and the defect in the bridge was the absence of railings, which could have been put on at a cost of $5, and the road district had employed men to erect the same, and there was an absence of evidence that the county ever had anything to do with the bridge. It was said that if it had been a large bridge the county would have been liable. Chandler v. Freemont County, 42 Iowa, 58.

And where it was not shown that the county had control over or constructed the bridge there was no liability; and the fact that it subsequently made an appropriation for repairing or reconstructing could not be shown. Titler v. Iowa County, 48 Iowa, 90.

So, where the bridge was small and one which it was the duty of the officers of the particular road district to keep in repair, the county was not liable. Taylor v. Davis County, 40 Iowa, 295.

A distinction was made between expensive bridges and small bridges, although in this case the county board of supervisors had sent a committee to examine the work including the bridge, and then established the road where the road had been changed. This bridge had not been erected by the county or by the county funds.

And a county was not liable for injuries caused by a defective culvert or bridge which was a part of an ordinary road or highway, as counties were not charged by law with the duty of keeping in repair the ordinary highways or roads, but this duty was committed to the several road districts whose officers acted independently and in the exercise of their duty were not under the control of the county authorities, and no right of action existed against the county in respect to defective roads. Soper v. Henry County, 26 Iowa, 269.

In that case it was said that under Iowa Rev. Stat. § 312, ¶ 18, § 710, authorizing county authorities to make and repair bridges and levy a bridge tax, counties were liable for injuries caused by the condition of such bridge requiring extraordinary expense to build and maintain, but were not liable for small bridges which it was the duty of the road-district officers to maintain.

So, a county was liable for negligence in the construction and maintenance of the approaches to its bridges the same as it would be for a bridge, and the fact that a part of the cost of the construction of the county bridge was contributed by others did not relieve the county from liability. Albee v. Floyd County, 46 Iowa, 177.

It was held that the question whether or not the approach was a part of the bridge was one of fact for the jury. It was also held that where the bridge was of such an extent that it required a large expenditure of money to construct it, it would be a county bridge, although the repairs could be made for a small amount, and the bridge had been built by others than the agents of the county. Moreland v. Mitchell County, 40 Iowa, 394.

And where a trestle work was made between a road and a bridge intended to be filled on both ends of the trestle work, but the fill was incomplete, and a man in driving along the road at night approached the trestle work when he was on the embankment and got out of the buggy to investigate and fell off because there was no railing, it was held that the jury were authorized to find that it was a continuation of the traveled highway, and when connected with the trestle work the whole formed an approach to the bridge. It was also held that if the embankment was intended to connect the trestle work, and one fill was made first, which when connected with the trestle work, made it dangerous to persons traveling along the highway, the county would be liable even if there was negligence on the part of the contractor, as it would be the duty of the county to see that suitable barriers were erected. It was further held that the jury were authorized to find that plaintiff was rightfully passing over both the earth and trestle work, although it had not been used before for public travel, as someone must be the first to pass over a newly constructed or repaired highway, and that whether he was guilty of contributory negligence or not was a question for the jury. Van Winter v. Henry County, 61 Iowa, 684.

The questions whether an approach to a bridge is a part of the same or forms a part of the highway, and also whether the accident occurred upon the approach, where there are no barriers on an approach of the height of 30 feet, should both be submitted to the jury at the same time. Newcomb v. Montgomery County, 79 Iowa, 487.

Whether an approach to a county bridge built by

by the legislature to elect a warden and trustees of its insane asylum to perform an important public duty in which it had no private interest, and from which it derived no special advantage. The warden and trustees, when so elected, were in no legal sense the agents of the county of Monroe, but were public officers engaged in the discharge of duties which involved the exercise of the police power, and in which the general public were interested.

While the county of Monroe, by its board of supervisors, was empowered to enact general rules and regulations for the government of the asylum, and to elect its warden and trustees, it had no power to interfere directly with the management of the institution unless the warden so elected was guilty of misconduct, when he could be removed by the board of supervisors.

The nonliability of counties and also of municipal and other corporations having special charters for the acts of their officers when engaged in the discharge of public duties, and to that extent exercising acts of sovereignty, is established by many cases. *Ensign* v. *Livingston County Supers.* 25 Hun, 20; *Alamango* v. *Albany County Supers.* 25 Hun, 551; *Ham* v. *New York*, 70 N. Y. 459; *Smith* v. *Rochester*, 76 N. Y. 506; *Benton* v. *Boston City Hospital*, 140 Mass. 13, 54 Am. Rep. 436; *Curran* v. *Boston*, 151 Mass. 505, 8 L. R. A. 243.

The learned counsel for the plaintiff, evidently appreciating the force of the general rule to which we have adverted, sought to show that the case at bar was, by reason of special facts, not within its operation.

It is insisted that the defendant, at the time of this accident, was not only caring for the pauper insane of Monroe county, but also for other patients through contracts made for that purpose.

There is no evidence that the county of

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the road district was a part of the bridge was a question for the jury in an action for injuries caused from the dangerous condition of the bridge and approach, and it was erroneous for the court to hold that, as a matter of law, the bridge and approach being more than 40 feet long are to be considered together as constituting a county bridge. Nims v. Boone County, 68 Iowa, 642, 66 Iowa, 272.

So, in Nims v. Boone County, 66 Iowa, 272, it was said that in Moreland v. Mitchell, 40 Iowa, 394, it was held that whether an approach to a bridge constitutes a part of the bridge, for negligence in the construction of which the county is liable, is a question of fact for the determination of the jury; and the court said it was held by the court that the jury in that case rightfully found the approach to be part of the bridge, but there are many differences between the facts of that case and this.

And in Roby v. Appanoose County, 63 Iowa, 113, it was held that an approach to a bridge may be a part of the bridge, for negligence in the construction and repair of which the county would be liable. In this case the evidence did not show who built the approach.

The plaintiff must show that he has exercised due care in order to recover.

A county was liable for injuries caused by a county bridge being out of repair, and the plaintiff was held not to be guilty of contributory negligence where he got out of his wagon and examined the bridge before crossing, although one end had settled about 2 feet but appeared to him to be strong, and there was no other place to cross. Kendall v. Lucas County, 26 Iowa, 395.

And an instruction that if the defect in a bridge was "observable to all" the defendant's officers would be presumed to have known of it did not show that plaintiff was guilty of contributory negligence in going upon the bridge. Homan v. Franklin County, 98 Iowa, 692. See former trial, 90 Iowa, 185.

And it was held that the plaintiff was not guilty of contributory negligence in driving on a bridge when he had no knowledge of any defect therein, although the accident happened by reason of decay and rottenness of its timbers. Huff v. Poweshiek County, 60 Iowa, 529.

But a county was not liable for injuries caused by want of a railing on a bridge where the same had existed for two years, which was known to the deceased, who, in walking on the bridge at night carrying a lantern and reading a letter, stumbled and fell and was killed, as his contributory negligence would bar a recovery, although such accident may have been caused by a large spike projecting from the floor, but there was no evidence that the county had knowledge of the same. Dale v. Webster County, 76 Iowa, 370.

And where injury was caused in an attempt to cross a defective bridge with a threshing outfit and steam engine weighing 8,250 lbs. where the plaintiff laid 3×12 inch planks 16 feet long for the wheels of the engine and moved at a slow speed, it was a question for the jury whether the use of such bridge was contributory negligence, and whether such use was reasonable, proper, and probable in view of the extent, kind, and nature of the travel and business on that road. Yordy v. Marshall County, 80 Iowa, 405.

In Walker v. Decatur County, 67 Iowa, 307, it was held erroneous to exclude evidence offered by the county to show that there was another equally convenient and perfectly safe road by which the plaintiff might have reached his destination and escaped injury from an unsafe bridge. It was further held that an instruction that if he knew the bridge was dangerous and could have reached his destination as readily by a different road, the use of this bridge constituted contributory negligence, was erroneous, in that the mere fact that it was unsafe would not of itself prevent a recovery, and that whether plaintiff exercised reasonable discretion in attempting to pass over was a question for the jury.

It was said that a county was liable for an injury to a person caused by a defective county bridge; but that this doctrine would not be carried any further and apply to anything else, as it was recognized as contrary to other decisions. Kincaid v. Hardin County, 53 Iowa, 430, 36 Am. Rep. 236. The court attempted to make a distinction between bridges and court-houses in respect to liability for defects on the ground that the county had an option as to building bridges but none as to court-houses.

Maryland.

In Maryland counties are held liable for injuries to travelers from the defective condition of the county bridges.

Where a party injured was negligent, but his negligence only remotely contributed to produce the accident caused by a small bridge being out of repair, he would be entitled to recover providing the road was in disrepair through defendant's negligence, and if the consequences of plaintiff's negligence would have been thereby avoided. Kennedy v. Cecil County Comrs. 69 Md. 65.

And under Md. Code, art. 23, § 1, declaring county commissioners to be a corporation, and to have power to appoint supervisors, and to have charge and control over county roads and bridges, and to

Monroe was caring for insane patients not residing in the county, for a consideration, but if such were the case it would be without warrant of law, as we think a fair construction of § 7 of chapter 82 of Laws of 1863, limits the contracts to be made "to any individual of said county" who wishes to contract as to the care of the insane of Monroe county.

There can be no doubt that the committee of a lunatic, or anyone legally liable to support him, should, in the first instance, be required to pay for his maintenance and the income derived in this manner is in no sense a source of profit to the county so that it would be deemed in law as conducting a private business.

We may also consider in this connection the suggestion that as the asylum received a small sum annually from the sale of surplus farm product it was to be treated as engaged in a private enterprise resulting in profits.

The revenue derived from both of the sources referred to is merely incidental and tends to some little extent to lessen the public burden assumed by the county of Monroe. *Curran* v. *Boston*, 151 Mass. 505, 510, 8 L. R. A. 243; *Alamango* v. *Albany County Supers.* 25 Hun, 551–553; *People, Society of New York Hospital*, v. *Purdy*, 126 N. Y. 679, and 58 Hun, 386.

We have considered the other suggestions of counsel for appellant contained in his brief and consulted the authorities to which he refers, but find nothing to take this case from the operation of the general rule.

The order of the General Term should be affirmed and under the stipulation of plaintiff judgment absolute ordered for the defendant dismissing the complaint on the merits, with costs to defendant in all the courts.

Ordered accordingly.

All concur, except **Haight, J.**, not sitting.

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have power to appoint all officers, agents, and servants as are required for county purposes, the county of Baltimore was liable for injuries caused by neglecting to repair a bridge on one of the public highways, and it was held that if the act of April 11, 1874 (Acts 1874, chap. 274), repealing local legislation for that county in relation to road supervisors until the January succeeding the accident, suspended power under that act, there was still general power under the Code. Baltimore County Comrs. v. Baker, 44 Md. 1.

Under Md. Code, art. 28, providing that the county commissioners of each county shall have charge of and control over county roads and bridges, and authorizing them to build and repair bridges, a county was liable for injuries caused by a defective bridge, where a bridge was erected by a canal company at the crossing of a highway and burned down, and the canal company erected another bridge at the same place. It was held that, although it was the duty of the canal company to maintain the bridge, and it was liable to the party injured or to reimburse the county, the county was also liable for injuries occurring. Eyler v. Alleghany County Comrs. 49 Md. 257, 33 Am. Rep. 249.

Where it was the duty of a canal company to keep a bridge in repair and it had notice of the suit, the county had a remedy over against the canal company for the amount of a judgment against the county. Chesapeake & O. Canal Co. v. Alleghany County Comrs. 57 Md. 201, 40 Am. Rep. 430.

The burden of proving contributory negligence in an action against a county for injuries caused from a defective bridge is on the defendant. The simple fact of the existence of a hole in the bridge with the knowledge of the plaintiff is not sufficient to bar a recovery against the county, where it is not shown that the hole rendered the bridge practically impassable. Prince George's County Comrs. v. Burgess, 61 Md. 29, 48 Am. Rep. 88.

Pennsylvania.

In Pennsylvania a county is liable to travelers for injuries received from a bridge being out of repair or insecure, where the county has notice of its condition. The fact that the plaintiff had reason to believe that the bridge was unsafe was held not to bar a recovery, as permitting the public to use it would hold the county liable; but it would not be liable where a statutory notice to repair was required but not given.

So, under Pa. act June 13, 1836, relating to roads, highways, and bridges, providing that county bridges on the line of adjoining counties shall be maintained and kept in repair by the commissioners of such counties at the joint and equal charge of both, under act April 13, 1843 (Pub. Laws, 221), making it the duty of the county commissioners of the several counties to repair all bridges erected by the county, and act May 5, 1854, extending this provision to the county of Armstrong, the county was liable where it was known that the timbers were rotten and the bridge unsafe, and that it was left in this condition. It was further held that it was not contributory negligence for plaintiff to use such bridge although he knew the condition, if the county did not see fit to give notice or prevent its use. Humphreys v. Armstrong County, 56 Pa. 204, 3 Brewst. (Pa.) 49.

In Armstrong County v. Clarion County, 66 Pa. 218, it was held that where the county was liable to pay for injuries caused by a defective bridge, as in Humphreys v. Armstrong County, 56 Pa. 204, such county might recover contribution from the other county.

Where a recovery was had against a county for injuries caused by a defective bridge, an instruction was proper which submitted to the jury the question that there could be no recovery if the deceased attempted to use a vehicle of extraordinary weight, if he did not first examine the condition of the bridge. The court held that the jury must have found that the injury was caused without any fault of the decedent, and in consequence of the negligence of the county. Shadler v. Blair County, 136 Pa. 488.

The county of Blair was liable for injuries causing death, from a defective bridge, where the deceased tried to cross a county bridge with a threshing engine and the bridge gave way, and the timbers were badly decayed, and ordinary inspection would have disclosed this defect. The bridge was built by the counties of Huntingdon and Bedford and was entered of record as a county bridge, and Blair county was formed from Huntingdon and Bedford counties, and from the organization of Blair county the bridge was known as a county bridge, and the only repairs ever made thereon were made by that county. Under Pa. act April 13, 1843 (Pub. Laws, 221), providing that it shall be the duty of the county commissioners to repair all county bridges, and act February 26, 1846 (Pub. Laws, 64), providing that Blair county and all the officers therein shall be subject to perform the same duties as other similar officers in other said counties, it was held that Blair county was bound by the same rule as other counties. Shadler v. Blair County, 136 Pa. 488.

But a county was not liable for injuries caused by defects in a county bridge, arising from a concealed breakage in an iron rod, which had probably existed for a long time. In the absence of evi-

Kate MARKEY, Admrx., etc., of Hugh Markey, Deceased, *Appt.*,
v.
QUEENS COUNTY, Impleaded, etc., *Respt.*

(154 N. Y. 675.)

1. No new liability for torts is imposed upon a county by a statute making it a municipal corporation for exercising the powers and discharging the duties of local government and the administration of public affairs, and providing that actions for damages for any injury to any property or rights for which it is liable shall be in the name of the county.

2. A county is not liable for the negligent exercise of the duty of maintaining bridges, imposed on it by the state, since it derives no special advantage from it in its corporate capacity.

(Bartlett and Martin, JJ., dissent.)

(January 11, 1898.)

APPEAL by plaintiff from a judgment of the Appellate Division of the Supreme Court, Second Department, affirming a judgment of a Special Term for Queens County in favor of defendant in an action brought to recover damages for personal injuries resulting in death alleged to have been caused by defendant's negligence. *Affirmed.*

The facts are stated in the opinion.

Mr. **Charles J. Patterson,** for appellant:

Each county is now a municipal corporation.

County Law, Laws 1892, chap. 686, § 2; General Corporation Law, Laws 1892, chap. 687, § 2; General Municipal Law, Laws 1892, chap. 685, § 1.

By the county law it is clearly contemplated that an action may be maintained against a county for damages.

Laws 1892, chap. 686, § 3.

The county of Queens and the county of Kings were charged by law with the duty of reconstructing this bridge (Laws 1892, chap. 288).

People, Keene, v. *Queens County Supers.* 142 N. Y. 271.

In England it is settled that a municipal corporation or other public body will not be held liable to an injured person for a mere nonfeasance consisting of a neglect to repair a public highway, even though the duty to repair is imposed by law upon the corporation.

Cowley v. *Newmarket Local Board,* 1 Fed. Rep. 45; *Thompson* v. *Brighton,* 9 Fed. Rep. 111; *Gibson* v. *Preston,* L. R. 5 Q. B. 218; *M'Kinnon* v. *Penson,* 8 Exch. 319; *Young* v. *Davis,* 7 Hurlst. & N. 760, Affirmed in 2 Hurlst. & C. 197.

It is also settled that for misfeasance whereby the safety of the highway is disturbed the corporation will be held liable.

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dence or of direct proof of negligence in the acceptance by the county, it would be presumed that upon the erection of the bridge it was properly examined. It was error to submit to the jury the question "Did the bridge fall by reason of a defect in the original construction?" Childs v. Crawford County, 176 Pa. 139.

And a county was not liable for injuries causing death occasioned by an unsafe bridge, under Pa. act March 6, 1860, § 2 (Pub. Laws, 105), making it the duty of the several townships and boroughs of S. county, in which any county bridge may be erected, to keep the same in repair at their own expense, and act March 21, 1861 (Pub. Laws, 163), providing that that section shall not be construed so as to require the several townships and boroughs in S. county in which any county bridge or bridges are now or may be erected to keep the same in repair, when in the opinion of the auditors of the township or borough the expense of repairing shall at any one time exceed $20, and if in the opinion of said auditors the repairs shall exceed the sum of $20 they shall cause the same to be made known to the county commissioners, who shall cause the same to be done at the expense of the county, and no notification as to the condition of the bridge or cost of repairs was given by the auditors to the commissioners. It was held that it was a question for the jury whether the injury was caused by defects in the original structure of the bridge or from want of repair. In the former event the county would be liable, in the latter the township, as it was only the duty of the county commissioners to make repairs in such cause where the township or borough auditors were of the opinion that the expense exceeded $20, and when, in addition, such opinion was made known to the commissioners. It appeared that its original construction was safe, but the bridge had become out of repair. Rigony v. Schuylkill County, 103 Pa. 382.

2. Where statute imposes liability.

Alabama.

In Alabama there is a statute imposing liability upon counties for failure to take an indemnity bond from contractors on public bridges where the guaranty has expired, but this liability does not attach to bridges which are not built by the county; and in the absence of this statute there is no implied liability on the part of counties.

So, a county was liable for injuries caused by a bridge falling in where the guaranty had expired, under Ala. Code, § 1203, providing that the county is liable for damages by a defect in a county bridge if a guaranty is not taken from the contractors, or the period has expired. This section was held to apply although it was not a toll bridge. Barber County v. Brunson, 36 Ala. 362.

And under Ala. Code, § 1203, the county was liable, although the bridge might have been built before the passage of the act, where the injury complained of occurred after its passage; but a charge given to the jury assuming that the bond was void, or that a period of six years during which the bridge was to be kept in repair had expired, was incorrect, where the bond was not invalid, as the question of the expiration of the guaranty where the date was uncertain was one for the jury; and it was also erroneous as a charge upon the effect of the evidence. Barbour County v. Horn, 48 Ala. 649.

Under Rev. Code, § 1396, same as § 1203, it must be alleged that no guaranty was taken from the builders of the bridge, or that such guaranty was taken, and that the time stipulated for its continuance had expired before the injury complained of was inflicted, in order to recover. Barbour County v. Horn, 48 Ala. 649.

A county was liable for damages for injuries from a defective bridge, under Ala. Code, § 1692, where the guaranty had expired, and the county could not be discharged by devolving the duty to repair on the overseer of the road, or by claiming that the repair amounted to a contract for the erection of another bridge. Greene County v. Eubanks, 80 Ala. 204.

But under Ala. Code, § 1203, providing that when a bridge has been erected under a contract with

Bathurst v. *Macpherson*, L. R. 4 App. Cas. 256; *Smith* v. *West Derby Local Board*, L. R. 3 C. P. Div. 423; *White* v. *Hindley Local Bd. of Health*, L. R. 10 Q. B. 219; *Blackmore* v. *Mile End Old Town*, L. R. 9 Q. B. Div. 452; *Whitehouse* v. *Fellowes*, 10 C. B. N. S. 765; *Foreman* v. *Canterbury*, L. R. 6 Q. B. 214; *Tucker* v. *Axbridge Highway Board*, 52 J. P. 87; *Cox* v. *Paddington*, 64 L. T. N. S. 566; *Ruck* v. *Williams*, 3 Hurlst. & N. 308; *Brownlow* v. *Metropolitan Bd. of Works*, 13 C. B. N. S. 768, Affirmed on appeal in 16 C. B. N. S. 546; *Southampton & I. Floating Bridge & R. Co.* v. *Southampton Local Bd. of Health*, 8 El. & Bl. 801.

The same distinction prevails in Massachusetts, where it has been held that at common law neither cities, counties, nor towns were liable for mere nonfeasance to a person injured by a defective highway.

Hill v. *Boston*, 122 Mass. 344, 23 Am. Rep. 332 and cases cited.

But the liability for misfeasance has been repeatedly enforced.

Doherty v. *Braintree*, 148 Mass. 495; *Waldron* v. *Haverhill*, 143 Mass. 582; *Doane* v. *Randolph*, 132 Mass. 475; *Hawks* v. *Charlemont*, 107 Mass. 414.

The construction and maintenance of the temporary structure are part and parcel of the general work of reconstruction, and negligence in such construction and maintenance of the temporary bridge is a positive misfeasance as distinguished from nonfeasance. It is like the case of one who lawfully digs a pit in the highway and puts a temporary bridge over it for public passage. Such a one is bound to use care in constructing and maintaining the temporary bridge.

Nolan v. *King*, 97 N. Y. 565, 49 Am. Rep. 561.

All public corporations are liable for creating nuisances.

Thayer v. *Boston*, 19 Pick. 511, 31 Am. Dec. 157; *Hawks* v. *Charlemont*, 107 Mass. 414.

There is no sound distinction between the sanction of an obligation voluntarily assumed by a public body and that of an obligation which the legislature in the due exercise of its powers has imposed upon it.

1 Thomp. Neg. p. 619; Jones, Neg. of Mun. Corp. §§ 59–69, pp. 113–129.

Where a duty to maintain or repair a highway or bridge is imposed by law upon a county, the county will be held liable at common law out of its corporate funds for an injury occasioned to an individual arising from the neglect to keep the bridge or highway in repair.

Mahanoy Twp. v. *Scholly*, 84 Pa. 136; *Newlin Twp.* v. *Davis*, 77 Pa. 319; *Rapho & West Hempfield Twp.* v. *Moore*, 68 Pa. 404, 8 Am. Rep. 202; *Dean* v. *New Milford Twp.* 5 Watts & S. 545; *Anne Arundel County Comrs.* v.

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the county commissioners with a guaranty by bond any person injured may sue on the bond, and, if no guaranty has been taken or the period has expired, may recover damages of the county, an action against a county on the ground that a bond of insufficient amount was taken, was denied. Barbour County v. Horn, 41 Ala. 114.

Where the evidence affirmatively showed that the bridge was not erected by contract of the county commissioners as provided by § 456, Code 1886, providing that a bond of indemnity shall be required of a contractor building a bridge, and if none is taken the county shall be liable for injuries caused by defective condition, under which the plaintiff sought to fix the liability upon the county, no recovery could be had. Roberts v. Cleburne County (Ala.) 22 So. 545.

In Covington County v. Kinney, 45 Ala. 176, it was held that in cases not under Ala. Rev. Code, § 1396, providing substantially as § 1203 for a liability for defective bridges on failure to take a bond from the contractor, counties were not required to keep public bridges in repair, and no liability attached for an injury from a defective bridge built by private subscription, although it was shown that the county had at one time paid for hauling lumber to repair said bridge, but the repairs were done by citizens gratuitously.

And under Ala. Rev. Code, § 1396, a county was not liable for injuries caused by a defective public bridge, where the bridge was not erected by a contract with the court of county commissioners, and was not such a bridge erected under the provisions of the Code as required the county to keep it in repair. Sims v. Butler County, 49 Ala. 110.

And in Barbour County v. Horn, 48 Ala. 649, it was said there was no liability against a county for damages from a defective bridge in the absence of a statute imposing a liability.

And a detached county in which was a defective bridge was not liable for injuries caused by such bridge where it was built by the county from which this county was detached, but there was no statute imposing a liability upon the detached county. Askew v. Hale County, 54 Ala. 639, 25 Am. Rep. 730.

In Askew v. Hale County, 54 Ala. 639, 25 Am. Rep. 730, it was said "that a county is not liable to an individual for an injury sustained, because of its failure to exercise a governmental power with which it is clothed, or because it is not exercised in the manner most conducive to the safety of the public, or because of the negligence or unskilfulness of its officers or agents, in the absence of a statute expressly declaring the liability."

Georgia.

In Georgia there is a statute imposing a liability where the bridge is a toll bridge built by the county or a bridge built by contract, if the county fails to take a seven-year guaranty bond, but the county is not liable after the expiration of seven years or for defects existing in other bridges.

So, a county was liable in damages for an injury resulting from a defective bridge where the bridge was built by a contract, and the county failed to take the bond, under Ga. Code, § 671, providing that when a public bridge is let out the contractor must in his bond make a condition to keep it in good repair for at least seven years, although the injury complained of occurred more than seven years after its completion. Mackey v. Murray and Whitfield Counties, 59 Ga. 832. (See Gwinnett County v. Dunn, 74 Ga. 358. This case is in effect overruled by Monroe County v. Flynt, 80 Ga. 489, although not referred to in that case.)

And where a county had let out a bridge by contract, and had failed to take a bond of sufficient guaranty, and injury was caused thereby, under Ga. Code, § 691, providing that if no bond or sufficient guaranty has been taken by the ordinary, the county is also liable for damages, it was held that the plaintiff could sue either the county or the contractor. Arnold v. Henry County, 81 Ga. 730.

And where the time covered by the contractor's bond for keeping it in repair had expired, and the county did not make a new contract for that pur-

Duckett, 20 Md. 468, 83 Am. Dec. 557; *Calvert County Comrs.* v. *Gibson*, 36 Md. 229; *Prince George's County Comrs.* v. *Burgess*, 61 Md. 29, 48 Am. Rep. 88; *Baltimore County Comrs.* v. *Baker*, 44 Md. 1; *Flynn* v. *Canton Co.* 40 Md. 312, 17 Am. Rep. 603; *Harford County Comrs.* v. *Wise*, 71 Md. 43; *House* v. *Montgomery County Comrs.* 60 Ind. 580, 28 Am. Rep. 657; *Morgan County Comrs.* v. *Pritchett*, 85 Ind. 68; *Pritchett* v. *Morgan County Comrs.* 62 Ind. 210; *Shelby County Comrs.* v. *Deprez*, 87 Ind. 509; *Madison County Comrs.* v. *Brown*, 89 Ind. 48; *Howard County Comrs.* v. *Legg*, 93 Ind. 523, 47 Am. Rep. 390; *Gibson County Comrs.* v. *Emmerson*, 95 Ind. 579; *Patton* v. *Montgomery County Comrs.* 96 Ind. 131; *Vaught* v. *Johnson County Comrs.* 101 Ind. 123; *Knox County Comrs.* v. *Montgomery*, 109 Ind. 69.

The foregoing cases were recently overruled on the ground that by the true construction of the Indiana statute the county was not charged with the repair of bridges, and could not, except in special cases, appropriate county funds to repair them.

Jasper County Comrs. v. *Allman*, 142 Ind. 573; *McCalla* v. *Multnomah County*, 3 Or. 424; *Eastman* v. *Clackamas County*, 32 Fed. Rep. 24; *Wilson* v. *Jefferson County*, 13 Iowa, 181; *Brown* v. *Jefferson County*, 16 Iowa, 339; *McCullom* v. *Black Hawk County*, 21 Iowa, 409; *Soper* v. *Henry County*, 26 Iowa, 264; *Collins* v. *Council Bluffs*, 32 Iowa, 324, 7 Am. Rep. 200; *Chandler* v. *Fremont County*, 42 Iowa, 58; *Huston* v. *Iowa County*, 43 Iowa, 456; *Krause* v. *Davis County*, 44 Iowa, 141; *Kincaid* v. *Hardin County*, 53 Iowa, 430, 36 Am. Rep. 236; *Huff* v. *Poweshiek County*, 60 Iowa, 529; *Cooper* v. *Mills County*, 69 Iowa, 350; *Hannon* v. *St. Louis County*, 62 Mo. 313; *Sims* v. *Butler County*, 49 Ala. 110; *Jackson* v. *Greene County Comrs.* 76 N. C. 282; *Threadgill* v. *Anson County Comrs.* 99 N. C. 352; *White* v. *Chowan County Comrs.* 90 N. C. 437, 47 Am. Rep. 534.

In the New England states and in many others it has been held that there is no distinction in liability between the cases of cities, counties, and towns, and that all three classes of corporations are free from such liability at common law.

Farnum v. *Concord*, 2 N. H. 392; *Hill* v. *Boston*, 122 Mass. 344, 23 Am. Rep. 332; *Mower* v. *Leicester*, 9 Mass. 247, 6 Am. Dec. 63; *Brady* v. *Lowell*, 3 Cush. 121; *Morgan* v. *Hallowell*, 57 Me. 375; *Jones* v. *New Haven*, 34 Conn. 1; *Hewison* v. *New Haven*, 37 Conn. 475, 9 Am. Rep. 342; *Sussex County Chosen Freeholders* v. *Strader*, 18 N. J. L. 108, 35 Am. Rep. 530; *Pray* v. *Jersey City*, 32 N. J. L. 394; *Detroit* v. *Blackeby*, 21 Mich. 84, 4 Am. Rep. 450; *Winbigler* v. *Los Angeles*, 45 Cal. 36; *Taylor* v. *Peckham*, 8 R. I. 349, 5 Am. Rep. 578; *Black* v. *Columbia*, 19 S. C. 412, 45 Am. Rep. 785; *Young* v. *Edgefield Dist. Road Comrs.* 2 Nott

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pose but undertook to keep the bridge in repair itself. Davis v. Horne, 64 Ga. 69.

And a county was liable for an injury caused by a public bridge being out of repair where such county had failed to take the contractor's bond, under Ga. Code, § 691, providing that if the county authorities fail to take the bond required by § 671 of the Code then the county shall be liable in the place of the contractor, and such bridge was built prior to the passage of the act of 1888, and where the injury occurred by reason of a horse becoming frightened at a hole in the bridge and backing the buggy over into the stream below, there being no bannisters or railings. (There was no question made as to the cause being fright. In this case the bridge was built to connect two counties, and one county refused to co-operate, and the suit was against the county which built the bridge.) Cook v. De Kalb County, 95 Ga. 218.

In Hammond v. Richmond County, 73 Ga. 188, it was said that where the statute provides a liability for counties for failure to take a bond to keep a bridge in repair, a recovery can be had for injuries.

And where a county was liable for injuries caused by a defective bridge, the county commissioners could be compelled by mandamus to pay it. Dearing v. Shepherd, 78 Ga. 28.

In Moreland v. Troup County, 70 Ga. 714, it was held that the right to recover for injury from a defective bridge was not affected by the adoption of the Constitution of 1877, art. 7, § 6, ¶ 2, restricting the taxing power of a county, and a demurrer to the petition on the ground that the injuries occurred after the adoption of the Constitution was overruled.

But a county was not liable for injury caused by want of proper repairs to a public bridge, where there was no allegation that the bridge was erected by letting it out to the lowest bidder, and that no bond was taken from the contractor faithfully to perform his contract and to indemnify for all damages occasioned by the failure so to do and to keep the bridge in good repair for seven years, and for such further time as may be embraced in the contract, under Ga. Code, § 691, providing that on failure to take such bond the county is liable. Collins v. Hudson, 54 Ga. 25.

And a recovery was denied where a party was injured by a defective bridge which was built under a contract awarded on May 12, 1888, and a bond was taken, as Ga. act December 29, 1888, did not apply to bridges which had been let out and built before the passage thereof. It was said that before the passage of the act of 1888 counties were not primarily liable for injuries received from defective bridges where they had taken bond as required by law from the contractor. Mappin v. Washington County, 92 Ga. 130.

And under Ga. Code, § 671, requiring, in case of county bridges built by the lowest bidder, that the contractor should give a bond for seven years, and a bond for three years was taken, the county was not liable where the accident occurred before the three years expired, as the contractor was primarily liable. It was said that if the accident had happened after the three years the county would probably have been liable, as in that event the county should be treated as having taken no bond at all under the Code, § 691. Mappin v. Washington County, 92 Ga. 130.

And where there was no contract to build the bridge, and it had been more than seven years since it had been built, and it was a public bridge, and was not under bond, a county was not liable for injuries caused from the same being out of repair. It was held that Ga. Code, December 29, 1888, on the subject of county bridges (Acts 1888, p. 39), was not applicable to any county bridge erected before the passage of the act, and under the prior laws the counties were not liable in a case of this kind. Bibb and Crawford Counties v. Dorsey, 90 Ga. 72; Grays v. Bibb County, 94 Ga. 698.

And a county was not liable for injuries caused by neglect of the proper authorities to repair a bridge where it was not a toll bridge or one built by contract, under Ga. Code, § 709, providing for suit against counties for neglect to keep bridges in

& M'C. 537; *Welsh* v. *Rutland*, 56 Vt. 228, 48 Am. Rep. 762; *Stilling* v. *Thorp*, 54 Wis. 528, 41 Am. Rep. 60; *Hiner* v. *Fond du Lac*, 71 Wis. 74; *Arkadelphia* v. *Windham*, 49 Ark. 139

Other courts, agreeing in the proposition that there is no distinction in liability between counties, cities, and towns, hold that they are all equally liable for negligence in the maintenance of public highways and bridges whereby an individual is injured.

Dean v. *New Milford Twp.* 5 Watts & S. 545; *Rapho & West Hempfield Twps.* v. *Moore*, 68 Pa. 404, 8 Am. Rep. 202; *Mahanoy Twp.* v. *Scholly*, 84 Pa. 136; *Newlin Twp.* v. *Davis*, 77 Pa. 317; *Chandler* v. *Fremont County*, 42 Iowa, 58; *Wilson* v. *Jefferson County*, 13 Iowa, 181; *Anne Arundel County Comrs.* v. *Duckett*, 20 Md. 468, 83 Am. Dec. 557; *Jackson* v. *Greene County Comrs.* 76 N. C. 282; *House* v. *Montgomery County Comrs.* 60 Ind. 580, 28 Am. Rep. 657; *McCalla* v. *Multnomah County*, 3 Or. 424; *Eastman* v. *Clackamas County*, 32 Fed. Rep. 24; *Hannon* v. *St. Louis County*, 62 Mo. 313; *Sims* v. *Butler County*, 49 Ala. 110.

Some classes of duties undoubtedly pertain strictly to the government, such as the furnishing of jails, court-houses, and the distribution of public charity.

Alamango v. *Albany County Supers.* 25 Hun, 551.

Other classes of duties belong to the private and corporate character, such as the maintenance of the New York and Brooklyn Bridge.

Walsh v. *New York*, 107 N. Y. 220.

Or such as the maintenance of public docks.

Mersey Docks & Harbour Board v. *Gibbs*, 11 H. L. Cas. 686.

Or beacons.

Gilbert v. *Trinity House*, L. R. 17 Q. B. Div. 795.

The cases in this state holding that towns could not be sued for negligence are put upon the ground that the town is not charged with the duty of repairing highways.

Morey v. *Newfane*, 8 Barb. 645. See also *People, Loomis*, v. *Little Valley Town Auditors*, 75 N. Y. 317.

The artificial reasoning which is used to discharge the county is exhibited in the opinion in *Albrecht* v. *Queens County*, 84 Hun, 399.

Mr. **Townsend Scudder,** for respondent:

A county is a corporation of limited corporate capacity and liability, and is under no liability in respect of torts.

1 Dill. Mun. Corp. §§ 22, 23 *et seq.*; *Ensign* v. *Livingston County Supers.* 25 Hun, 21; *People, Downing*, v. *Stout*, 23 Barb. 338; *Hamilton County Comrs.* v. *Mighels*, 7 Ohio St. 109; *Bertles* v. *Nunan*, 92 N. Y. 152, 44 Am. Rep. 361; *Fitzgerald* v. *Quann*, 109 N. Y. 441; *Northern Transp. Co.* v. *Chicago*, 99 U. S. 635, 25 L. ed. 336; *People, Keene*, v. *Queens County*

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repair when the bridge is a toll bridge built by the county, or § 741, providing that if a bond is not taken from the contractor the county shall be liable for damages, did not apply. Scales v. Chattahoochee County, 41 Ga. 225.

A county was not liable for injuries resulting from a defective bridge where it was not alleged that toll was charged, under Ga. Code, § 669, providing that the ordinary may establish a toll bridge for the benefit of the county; but when toll is charged the county is liable as individuals owing them. Arline v. Laurens County, 77 Ga. 249.

In Arline v. Laurens County, 77 Ga. 249, the cases of Gwinnett County v. Dunn, 74 Ga. 358, and Collins v. Hudson, 54 Ga. 25, were approved.

In Gwinnett County v. Dunn, 74 Ga. 358, it was held that an action did not lie against a county for damages caused by neglect of proper authorities to repair a bridge, where it was not shown that it was a toll bridge or such a one as was built by a contractor, and that there was a failure to take the proper bond of indemnity required by the Code. Following Scales v. Chattahoochee County, 41 Ga. 225, and Collins v. Hudson, 54 Ga. 25.

In Gwinnett County v. Dunn, 74 Ga. 358, it was said that the decisions in Mackey v. Murray and Whitfield Counties, 59 Ga. 832, and Davis v. Horne, 64 Ga. 69, seem to have been made without any reference to Collins v. Hudson, 54 Ga. 25.

In Monroe County v. Flint, 80 Ga. 439, it was held that a county was not liable for injury from a defective bridge although no bond was taken and more than seven years had expired, under Ga. Code, § 671, providing that the contractor must in his bond make a condition to keep it in good repair for at least seven years, as the construction would be that a contractor would be liable and the county would be liable if they failed to take the bond, and the contractor would be liable to keep the bridge in good repair for seven years, and the liability of the county did not extend beyond that. This case virtually overrules Mackey v. Murray and Whitfield Counties, 59 Ga. 832, but does not refer to that case.

A county was not liable for damages caused by a defective bridge where the plaintiff by the use of proper care could have prevented the injury. Macon County v. Chapman, 74 Ga. 107.

Kansas.

In Kansas it was formerly held that there was no implied liability against counties for failure to keep a bridge in proper condition, but now a statute provides that if the chairman of the board of county commissioners has five days' notice of such defects the county will be liable.

So, a county was not liable for injuries caused from a defective public bridge in the absence of any statute imposing a liability. The court said there is a distinction between the liability of cities and of quasi corporations like counties in this state. Marion County Comrs. v. Riggs, 24 Kan. 255.

Where defects in a county bridge are described by witnesses who have knowledge of the same, and the character and extent of such defects are comprehensible by the ordinary mind, the jury are the judges of the safety of such bridge for travel, and evidence by a witness, even an expert, as to his opinion, is incompetent. Murray v. Woodson County Comrs. (Kan.) 43 Pac. 554.

But a county is only bound to exercise reasonable or ordinary care and diligence in the discovery and repair of defects in its bridges, under Taylor's Kan. Gen. Stat. 1889, ¶ 7134 (Laws 1887, chap. 237), providing that any person who shall without contributory negligence sustain damage by reason of a defective county bridge may recover from the county, where the chairman of the board of county commissioners shall have had five days' notice of such defects prior to the time when such damage was sustained. Murray v. Woodson County Comrs. (Kan.) 43 Pac. 554.

In an action under Taylor's Kan. Gen. Stat. ¶ 7134 (Laws 1887, chap. 237), to recover for injuries occasioned by a defective bridge, it must be proved that the chairman of the county board had notice of such defect, and the presumption that another

Supers. 142 N. Y. 271; *Mower* v. *Leicester*, 9 Mass. 247, 6 Am. Dec. 63.

The maintenance of highways and bridges is a public, not a private, function of government, and for its exercise a county does not incur a liability to an individual.

Maxmilian v. *New York*, 62 N. Y. 160, 20 Am. Rep. 468; *Lloyd* v. *New York*, 5 N. Y. 374, 55 Am. Dec. 347; *Eastman* v. *Meredith*, 36 N. H. 284, 72 Am. Dec. 302; *Hill* v. *Boston*, 122 Mass. 344, 23 Am. Rep. 332.

A county, in caring for highways and bridges, performs a duty properly belonging to the towns within its limits; a town not being liable for defects in highways and bridges, the county can incur no liability by the performance of this duty.

Hill v. *Livingston County Supers.* 12 N. Y. 52; *Barber* v. *New Scotland*, 88 Hun, 522; *Martin* v. *Brooklyn*, 1 Hill, 545; *Waldron* v. *Haverhill*, 143 Mass. 582; *Doherty* v. *Braintree*, 148 Mass. 495; *Hawks* v. *Charlemont*, 107 Mass. 414; *Mower* v. *Leicester*, 9 Mass. 247, 6 Am. Dec. 63; *Bigelow* v. *Randolph*, 14 Gray, 541; *Chidsey* v. *Canton*, 17 Conn. 475; *Reed* v. *Belfast*, 20 Me. 246; *Eastman* v. *Meredith*, 36 N. H. 284, 72 Am. Dec. 302; *Morey* v. *Newfane*, 8 Barb. 645; *People, Van Keuren*, v. *Esopus Town Auditors*, 74 N. Y. 316; *Hill* v. *Boston*, 122 Mass. 344, 23 Am. Rep. 332.

The bridge in question was in the control of the contractors, who alone are liable for the failure to keep it in repair.

2 Dill. Mun. Corp. §§ 1028–1030; *Engel* v. *Eureka Club*, 137 N. Y. 100; *Nolan* v. *King*, 97 N. Y. 565, 49 Am. Rep. 561; *Pack* v. *New York*, 8 N. Y. 222; *Blake* v. *Ferris*, 5 N. Y. 48; *Kelly* v. *New York*, 11 N. Y. 432; *McCafferty* v. *Spuyten Duyvil & P. M. R. Co.* 61 N. Y 178; *Engel* v. *Eureka Club*, 137 N. Y. 100.

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

Plaintiff's intestate lost his life through the breaking down of the bridge over Newtown creek, and this action was brought to recover damages of the defendants, the county of Queens and the city of Brooklyn, for their alleged negligence with respect to the condition of the bridge. A bridge had long existed over Newtown creek, which was the boundary line between the counties of Kings and Queens; and, pursuant to an act passed in 1892, the boards of supervisors of these counties had made a contract for its reconstruction. Meanwhile, a temporary foot bridge, for the accommodation of foot passengers during the progress of the work, was erected, and made use of by the public. The plaintiff alleges that this temporary bridge was insufficient, out of repair, inadequate for its purposes, and not calculated to bear the strain to which it would be subjected, and that the defendants were

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member told him will not be indulged. Murray v. Woodson County Comrs. (Kan.) 48 Pac. 554.

Where the evidence showed that the county rebuilt, maintained, and undertook to repair a bridge at the expense of the county, which cost more than $200, the court properly instructed the jury "there is no dispute of the fact that the bridge and approaches in question were built and paid for by the county." Nemaha County Comrs. v. Allbert (Kan. App.) 51 Pac. 307.

The mere fact that the board of county commissioners established a rule that the matter of repairing bridges should be left to the commissioners in whose district the bridge is located did not tend to show whether or not the chairman had actual notice of the defective and dangerous condition of the bridge, and such evidence was properly refused. Nemaha County Comrs. v. Allbert (Kan. App.) 51 Pac. 307.

See subhead *Where the injury was caused by the fright of a horse*, I. c.

Massachusetts.

In Massachusetts there is a statute imposing a liability.

Under Mass. Stat. 1877, chap. 234, and 1879, chap. 244, providing that for injuries the plaintiff should within thirty days thereafter give written notice of the time, place, and cause of said injury, a notice was sufficient where it stated the name of the bridge and that "said injuries were caused by a defect in the planking of the said bridge, one of the plank being insufficient in length, which insufficiency caused a hole in the said bridge into which I fell," although it appeared in evidence that there were three holes of a similar character, but the others were not as large as the one into which the plaintiff fell. The notice was also sufficiently addressed: "To Lewis Warner, Treasurer County of Hampshire. Dear Sir,—I hereby give you notice that I have this day . . . received bodily injuries, etc.," under Mass. Stat. 1877, chap. 234, providing that notice may be given in the case of a county to any one of the county commissioners or to the county treasurer. Lyman v. Hampshire County, 138 Mass. 74.

A county was liable for injuries caused to a person by a defect in a bridge, under Mass. Stat. 1794, chap. 30, which provided for imposing one half the expense on said county and the other half on a town, although the officers of the town had always made the necessary repairs, receiving one half of the expense thereof from the county. It was held that both the town and the county would be equally liable, but after verdict nonjoinder of the town could not be set up. Lyman v. Hampshire County, 140 Mass. 311.

Where plaintiff was injured by stepping into a hole on a bridge, and there was evidence that it had existed for ten years, and that the officers of the county were very frequently on the bridge, it was a question for the jury whether the county might have had notice by reasonable diligence, and whether the injury to the plaintiff might have been prevented by care and diligence on the part of the county; and the fact that he had previous knowledge of the defect was not conclusive evidence of his negligence. Lyman v. Hampshire County, 140 Mass. 311.

Michigan.

Under How. (Mich.) Stat. § 1442, the township, village, city, or corporation whose corporate authority extends over a public highway, street, bridge, or culvert, is liable for injuries caused by negligence in not keeping the same in repair. There appear to be no cases against counties under this statute.

Nebraska.

In Nebraska a county was not liable in the absence of any statute, but there is now a liability imposed by statute for injuries caused to travelers from defective bridges.

A county was not liable for injuries caused by a defective public bridge in the absence of any statute imposing a liability. It was said: "Counties were not liable at common law for injuries caused in the manner set forth in the petition in this case, and our statute, in force at the time of the alleged injury, did not change the common-law rule." Woods v. Colfax County Comrs. 10 Neb. 552.

But a county was liable for negligence in failing

negligent in permitting its use by the public in that condition. The county of Kings, under chapter 954, Laws 1895, became absorbed on January 1, 1896, into the city of Brooklyn, which was therefore made a defendant. The county of Queens, the other defendant, demurred to the complaint, for not stating facts sufficient to constitute a cause of action against it. The demurrer was sustained at the special term and at the appellate division of the supreme court, in the second judicial department, which latter court has certified the case to us, as involving a question of law which ought to be reviewed by this court. That question, broadly, is whether, by any rule of law, as established in this state, a county may be held liable at the suit of a private individual who has received personal injuries from a defective bridge, with the maintenance of which the county was chargeable. The question is one of considerable interest, and, beyond the general discussion, demands an interpretation of the provisions of the county law of 1892 (Laws 1892, chap. 686), the 2d section of which declares the county to be a municipal corporation. The provision is as follows: "A county is a municipal corporation, comprising the inhabitants within its boundaries, and formed for the purpose of exercising the powers and discharging the duties of local government, and the administration of public affairs conferred upon it by law." By the 3d section, it is provided that "an action . . . to enforce any liability created, or duty enjoined upon it, or upon any of its officers or agents for which it is liable, or to recover damages for any injury to any property or rights for which it is liable, shall be in the name of the county." It is argued that the county, being thus declared a municipal corporation and being charged by law with the duty of maintaining the bridge, is made subject to those liabilities which it was understood the law attached to that class of corporations for breaches of duty. It is urged that as counties never were known, before this statute, as municipal corporations, the legislature, in its enactment, must have intended that they should be treated as upon a par with cities, when engaged in similar transactions, and that this proposition should be sustained from the point of view of public interest. In considering the question before us, we must not fail to observe that the language of § 3, above quoted, seems to import no further liability than that which was then existing. The only portion of that section which is material to the case is that which provides for an action "to recover damages for any injury to any property or rights for which it is liable." In other words, what the legislature appears to have done was to provide that, where the county is liable for an injury, the

to keep a bridge in repair, under Neb. act July 1, 1889 (Laws 1889, chap. 7, Rev. Stat. p. 733), providing that if damage happens to any person or property by means of insufficiency or want of repair of a highway or bridge which the counties are liable to keep in repair, the person sustaining the damage may recover against the county. Hollingsworth v. Saunders County, 36 Neb. 141.

In Hollingsworth v. Saunders County, 36 Neb. 141, Woods v. Colfax County Comrs. 10 Neb. 552, was distinguished, as this statute was passed after that decision.

New Jersey.

In New Jersey there was no implied liability for injuries to travelers from defective bridges, but there is now a statutory liability.

The board of chosen freeholders of a county was not liable for injuries sustained by reason of an abutment of a public bridge being without side railings, under N. J. Rev. Laws, 47, § 1, providing that the freeholders are to consider and decide upon the utility and necessity of erecting, rebuilding, or repairing bridges, as this statute made it discretionary. It was said that if they erred in judgment, however well meaning, and the plaintiff's counsel were correct in their argument, they would be exposed to all the responsibility, but "this gross injustice arises from the counsel's substituting the responsibility of the freeholders in place of the county, which latter is under all circumstances bound prima facie to keep the public bridges in good repair and liable to indictment if it do not." Sussex County Chosen Freeholders v. Strader, 18 N. J. L. 108, 35 Am. Rep. 530.

An individual could not sustain an action against the board of chosen freeholders for injuries sustained by reason of a defect in a public bridge constructed by them. Cooley v. Essex County Chosen Freeholders, 27 N. J. L. 415. Following Sussex County Chosen Freeholders v. Strader, 18 N. J. L. 108, 35 Am. Rep. 530.

But the freeholders of a county were liable on the ground of neglect for injuries caused by falling off the abutment wall of the approach to a bridge, under N. J. act March 15, 1860 (Pub. Laws, p. 285, Rev. p. 86, § 9), where they adopted a plan which contemplated the filling in of the sidewalk by others so as to bring it up to the abutment wall, and were preparing a permanent railing to render the approach safe, but put up no temporary barrier, and the dangerous condition was notorious for more than two weeks before the injury. Morris County Chosen Freeholders v. Hough, 55 N. J. L. 628. In this case the plan of the committee contemplated a structure with the sidewalk filled in by others to be protected by a railing erected by defendants on the wing wall of the bridge, and the defendants were in the performance of that duty when the plaintiff was injured, and the neglect consisted in not providing a temporary barrier, having knowledge of its danger.

Oregon.

In Oregon there was a statutory liability for defective bridges, but this statute has been repealed.

A county was not liable for injury resulting from defect in a bridge, after Oregon Code, § 347, providing that an action may be maintained against a county for injury to the rights of plaintiff arising from some act or omission of such county, was amended in 1887 by omitting the words "or for an injury to the rights of the plaintiff, arising from some act or omission of such county or other public corporation." It was held that Oregon Const. art. 1, § 10, providing that every man shall have a remedy by due course of law for injury done him in person, property, or reputation, did not prevent a repeal of this statute, although before the adoption of the Constitution there was a similar statute enacted by the territorial legislature. Templeton v. Linn County, 22 Or. 313, 15 L. R. A. 730. In this case the statute was repealed before the injury was caused.

In Templeton v. Linn County, 22 Or. 313, 15 L. R. A. 730, the case of McCalla v. Multnomah County, 3 Or. 424, was distinguished, as the statute was different in that case.

But under Oregon Code Civ. Proc. subd. 4, § 870, authorizing the county court to provide for the erection and repair within the county of public bridges on any road or highway, and Laws 1854-'55, p. 168, act June 7, 1854, § 4, authorizing an action

action shall be in the name of the county. If, prior to the passage of the county law, the county was not liable for such an injury as was sustained in the present case, did it become so thereafter, by implication from the language of the 2d section, as argued for the appellant, in the use of the words "municipal corporation," or by reason of the 3d section?

To a clear understanding of the question, it may be well to consider what was the legal status of counties of this state, and then, incidentally, what is that of a municipal corporation proper, such as an incorporated city. The civil divisions of a state into counties had their origin in England, where, preceding the organization of the Kingdom itself, they were thereafter continued, from recognized necessities in government, as other countries had their departments or their provinces. In such divisions it was found that the purposes of local government and of the administration of justice were promoted. Differing from England in their origin, in this country they were first created by the legislatures of the various colonies, and subsequently by the states of the Union. They were invested with such corporate attributes as were essential to a proper performance of the duties of local government. They were, in effect, subdivisions of the governed territory, established for the more convenient administration of government and having such powers as were necessary to be exercised and for the welfare, advantage, and protection of the public within their boundaries. While in the people resided the sovereign right to declare the general mode of their government, it was the appropriate duty of their legislative body to so arrange the territory of the state into civil divisions, and to so apportion among them governmental duties, as would best conduce to the advantage of its citizens. By the common law of England, a county, though sometimes regarded as a quasi corporation, could not be subject to a civil action for a breach of its corporate duty unless such an action was expressly given by statute. The duty of maintaining and repairing bridges belonged to it, but the only remedy for a breach of that duty was by presentment or indictment. An unsafe condition of a highway, or a bridge as a part of the highway, was regarded as the subject of a popular action, and not of a private action. In *Russell* v. *Deron County*, 2 T. R. 667, which was an action by an individual against the inhabitants of a county for an injury sustained through the defective condition of a county bridge, it was held that they were not such a corporation, or quasi corporation, against whom such an action could be maintained. It was reasoned that, while the inhabitants of the county might be a corporation for some purposes, no statute had authorized such an action, and that the action would be one against the public. The authority of that case, as settling the rule at common law

against a county for an injury to the rights of plaintiff arising from some act or omission of said county, a county was liable where a plank in the floor of a bridge was broken or too short, and one horse of a team becoming frightened pushed the other horse, causing him to step off the bridge drawing the team and buggy over and injuring plaintiff. It was further held that act February 21, 1887, amending Code Civ. Proc. chap. 4, title 4, § 347, restraining the right to maintain an action against the county to cases arising on contract, which act was passed after this action was commenced, did not affect plaintiff's claim. It was said: "The 14th Amendment declares that the state 'shall not deprive any person of . . . property without due process of law.' Assuming, as I do for the present, that the plaintiff's right of action, whether vested or not, is not 'property,' within the meaning of this amendment, there is nothing in the Constitution of the United States or of this state prohibiting the passage of retrospective laws by the latter, provided they do not impair the obligation of contracts, or partake of the character of *ex post facto* laws. Subject to these qualifications, the state may pass retrospective laws, and thereby devest vested rights, without violating the Constitution of the United States. . . . And admitting that the right to maintain this or an equivalent action for the redress of this wrong is a vested one, of which the plaintiff ought not to be wantonly deprived, it is clear the legislature may do so, if it will, unless the Constitution of the state is in the way." But it was further held that, under Or. Const. art. 1, § 10, providing that every man shall have a remedy by the course of law for injury done him in personal property or reputation, this right could not be taken away by any statute. Eastman v. Clackamas County, 32 Fed. Rep. 24.

And a county, having laid out and opened a road and built a bridge thereon, and invited the public to walk thereon, was estopped from denying that it was a public road. Eastman v. Clackamas County, 32 Fed. Rep. 24.

And under Oregon Laws, December 19, 1865, § 4 (Oregon Laws, 723, § 40, note), providing that a bridge of 10 feet or more span shall be built in a good substantial manner and covered with sound plank well spiked down, the county was chargeable with negligence in not having planks well spiked down, by reason of which an injury was caused. The want of railing was negligence on the part of the county when the accident could have been prevented by a railing on the bridge. Eastman v. Clackamas County, 32 Fed. Rep. 24.

And a county was liable for damages caused by a defective bridge which was out of repair through the negligence of the county, under Oregon Stat. 863, § 19, providing that all county roads shall be under the supervision of the county in which such road is situated, and making it the duty of the county court to appoint supervisors, and giving the court power to remove the same on failure to perform their duties, and Oregon Code, p. 235, § 347, providing that an action may be maintained against the county for an injury to the rights of plaintiff arising from some act or omission of such county. McCalla v. Multnomah County, 3 Or. 424.

A county was liable for damages caused by a defective bridge where such bridge was a public bridge or was knowingly recognized as a county structure by the proper officials of said county, and they had been notified for a reasonable time prior to the accident of the defective condition of the bridge, or where it had been openly and notoriously unsafe to such an extent is to convey notice of its condition for a reasonable time prior to the accident. It was further held that the mere fact of intoxication of the injured party would not of itself bar a recovery. Ford v. Umatilla County, 15 Or. 313.

In Ford v. Umatilla County, 15 Or. 313, it was said that under Oregon Sess. Laws 1887, p. 45, the liability of counties had been changed but the act was passed after this accident, and it was held that it did not apply, as in Eastman v. Clackamas County, 32 Fed. Rep. 24. The decision in the Ford Case evi-

that no civil action could be maintained for an individual injury in consequence of the breach of a public duty on the part of the inhabitants of a county, has been repeatedly recognized in England and in this country. I may refer in particular to the case of *Bartlett* v. *Crozier*, in this state (17 Johns. 439, 8 Am. Dec. 428), and to the cases in Massachusetts of *Riddle* v. *Proprietors of Locks & Canals*, 7 Mass. 169, 5 Am. Dec. 35, and *Mower* v. *Leicester*, 9 Mass. 247, 6 Am. Dec. 63, and to the very thorough discussion of the cases in England and in the United States, which will be found in *Hill* v. *Boston*, 122 Mass. 344, 23 Am. Rep. 332, and in chapter 23, 2 Dill. Mun. Corp. I think it, however, sufficient to confine the present discussion to what the statutes and decisions of this state require us to hold upon the question.

In this state, its division into counties or sections for the purposes of local government was but a continuance of a method which, while a colony, it had adopted from England. By the Constitution of the state, it was provided that such parts of the common law as formed the law of the colony of New York were retained as the law of the state. If, under the common law, counties could not be subjected to private actions for the results of acts done in the performance of governmental duties, then it should follow that counties of this state could not become liable to such actions, unless the common law in that respect has been changed by statute. Where a principle of the common law has entered into our form of government, it is controlling, until by legislation, express in its terms, it is modified, or negatived by the substitution of a new declaration upon the subject. The only statute for which that could be claimed is the county law of 1892, which heretofore I have referred to. Having regard to the fact that counties were created such for the better and more convenient government of the state, both upon authority and upon principle, in the exercise of those political powers which appertain to local government, and which are for the public benefit, they should be no more liable for damages resulting therefrom, at the suit of a private individual, than would be the state itself. The counties and towns of this state were always bodies corporate for certain purposes; having been endowed with capacities to purchase and to hold real and personal property, and to make contracts in reference thereto. Rev. Stat. pt. 1, art. 1, title 1, chaps. 11, 12. The corporate powers were of defined and limited extent, and in all other respects which concern governmental duties, included among which was the conservation of highways, roads, and bridges, they were merely divisions organized for the convenient exercise of portions of the political power of the state. *Lorillard* v. *Monroe*, 11 N. Y. 392, 62 Am. Dec. 120. The common-law rule which rested the duty of caring for and repairing highways and bridges upon the counties did not obtain in this state. That

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dently must have been upon the same statute upon which the prior affirmative decisions were made, although such statute was not referred to in the opinion, but reference was made to the new statute which relieved the counties from liability.

In Heilner v. Union County, 7 Or. 83, 33 Am. Rep. 703, it was held that a county was liable for injuries caused by a bridge being out of repair, but no recovery could be had where it was not shown that the county authorities knew of its condition, or no averment made of a statement of facts from which they might have known it with reasonable diligence. It was held that if the condition of the bridge was stated to be such that the road supervisor by the use of ordinary diligence might have known of its condition, a recovery would be allowed.

South Carolina.

Under S. C. Gen. Stat. § 1087, making the county liable for injuries from defective roads, and providing that such damage should not be recovered by the person so injured if his load exceeded the ordinary weight, amended December 19, 1892, so as to read "provided, such person has not in any way brought about such injury or damage by his own act, or negligently contributed thereto, etc.; and provided further, that such county shall not be liable, unless such defect was occasioned by the neglect or mismanagement," etc., where a person was injured before the amendment and the action was not brought until after the amendment,—it was held that if his action was under the prior statute he should negative the proviso to show that his vehicle was not overloaded, and if the amendment applied no recovery could be had unless the county commissioners were negligent. It was further held that they were not negligent in this case, where they were very active in their effort to repair a bridge over a swamp after a flood and made a contract and gave notice that the bridges were let out for repair, and that they would not be responsible for any damages while crossing, which notice was posted up at each side of the swamp. The trial judge held that no recovery could be had under the old statute on an allegation that plaintiff was riding a mare and plaintiff showed that he was driving, as the variance would be important under a statute fixing the load at a certain weight. Cope v. Hampton County, 42 S. C. 17.

Where a horse was frightened on a public bridge by reason of a piece of timber which was lying near for the purpose of repairing the bridge, and backed the buggy off the bridge where there was no railing, and injured the plaintiff, and the only allegation of defect in the repair of the bridge was that one piece of railing or bannister was absent, it was held that the absence of such piece of railing would not be called a defect in the repair contemplated by S. C. Gen. Stat. § 1087. Brown v. Laurens County, 38 S. C. 232.

See also subhead, *Where the injury was caused by the fright of a horse*, I. a.

West Virginia.

A county was liable for injuries caused by a horse becoming frightened at a pile of large rocks on the roadside, and backing over an unprotected wall of the approach to a bridge, throwing the plaintiff out and injuring the buggy, which would not have happened if a suitable railing had been placed along the bridge, where the fall of the horse and the accident were almost simultaneous, and want of care could not be imputed to the driver. Rohrbough v. Barbour County Ct. 39 W. Va. 472. (For the West Virginia statute see Phillips v. Ritchie County Ct. 31 W. Va. 473, subd. I. b.)

In Rohrbough v. Barbour County Ct. 39 W. Va. 472, it was said that in Smith v. Kanawha County Ct. 33 W. Va. 713, 8 L. R. A. 82, a recovery was denied in a similar case for a defective road, but that was on account of the negligence of the driver.

See also subhead, *Where the injury was caused by the fright of a horse*, I. c.

b. *From defective roads and highways.*

It is held, with but few exceptions, that counties

duty was confided to the officers of towns. But special acts were passed from time to time, whereby the burden has been shifted so as to be imposed, either upon two or more towns, or upon the county, or upon both counties and towns. *Hill* v. *Livingston County Supers.* 12 N. Y. 52. In the county law of 1892 it was provided that where a bridge spans any of the navigable tide waters of this state, as in the present case, forming a boundary line between two counties, the expense of its maintenance is made an equal charge on the two counties in which the bridge is situated. § 68. Whether the maintenance of highways and bridges is devolved as a duty upon the towns or upon the counties of the state, it must be regarded as a duty, in its nature, public and governmental. *Lorillard* v. *Monroe*, 11 N. Y. 392, 62 Am. Dec. 120. There is no distinction to be made between highways and bridges, in the matter of the duty. A public bridge is a public highway. Angell, Highways, § 40. Its maintenance is quite as much a governmental duty towards the public within the territory of the state, and the principle that the state holds its highways in trust for the public is applicable. *Northern Transp. Co.* v. *Chicago*, 99 U. S. 635, 25 L. ed. 336. This is especially true where a bridge is necessary to cross the navigable waters of the state, but it is true under all circumstances. In *People* v. *Rensselaer & S. R. Co.* 15 Wend. 113, 134, 30 Am. Dec. 33, it was said by Savage, Ch. J.: "There can be no question, therefore, that the state legislature has the power to build bridges where they shall be necessary for the convenience of its citizens. . . . It is the duty of the state governments to afford their citizens all the facilities of intercourse which are consistent with the interests of the community." To charge the duty of building and maintaining a bridge over navigable waters upon the boards of supervisors of counties was but a convenient mode of exercising that governmental function. The power thus conferred upon the county officers was for the public benefit, and in its exercise they acted as the agents for the public at large. The state, in its sovereign character, had a duty to perform in the maintenance of the bridge as a part of the public highway, and its performance might properly be delegated to the officers of the particular civil division. The corporate body of Queens county derived no especial advantage from it in its corporate capacity, and, if that be true, it should not be liable for the negligent acts of the board of supervisors, upon whom the duty was rested of reconstructing the bridge. It should be as exempt from a private action as would be the state itself. In *People* v. *Queens County Supers.* 142 N. Y. 271, we expressly held that the power conferred upon the counties of Kings and Queens with respect to this work was in the public interests, and for the public benefit. As lately as in the case of *Hughes* v. *Monroe County*, 147 N. Y. 49, *ante*, 33, where it was sought to hold the de-

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are not liable for injuries to travelers caused by roads or highways being out of repair, in the absence of a statute imposing a liability. Some of the states which allow a liability for defective bridges refuse to apply the same rule in regard to roads, although recognizing that the principle is the same. In Maryland a recovery is allowed. So in New Jersey where the county made an excavation in the road. In South Carolina and West Virginia the statute imposes a liability.

In Indiana a county was held not liable for personal injuries sustained while driving upon a free gravel road of a county, by reason of defects in the construction and repair of such road. It was said that the principle was the same in regard to roads as in regard to bridges, but that Indiana has adopted a rule in regard to bridges which was contrary to the weight of authority [since overruled, see *supra*, I. a], and it would not be extended to apply to roads. Cones v. Benton County Comrs. 137 Ind. 404.

And a county was not liable for injuries caused from a defective highway where lumber on the same caused plaintiff's horse to run away, as the law has not given boards of commissioners power to raise money to repair highways, nor imposed the duty of keeping public highways in repair upon county boards. Abbett v. Johnson County Comrs. 114 Ind. 61.

In Fulton County Comrs. v. Rickel, 106 Ind. 501, it was said that counties are not responsible for defective highways.

And for damages occasioned by a defective sidewalk under its control a county was not liable. It was said that counties partake of the immunity of states, and are not subject to liabilities of this kind. Clark v. Lincoln County, 1 Wash. 518.

So where a party was injured by reason of a sidewalk on the court-house premises being out of repair a recovery was refused. Dodsall v. Olmsted County, 50 Minn. 96, 44 Am. Rep. 185.

Where a county contracted for a curb between a park owned by the county and the street, and the commissioners prohibited the dirt from being thrown on the grass, and the contractor placed it on the sidewalk without warning or protection to passersby at night, and a person fell into the trench, no recovery could be had, as the work was not being done by the county but by independent contractors. Eby v. Lebanon County, 166 Pa. 832.

In Worden v. Witt (Idaho) 39 Pac. 1114, in an action against a county commissioner individually for injuries received from defective highways, it was said: "To hold counties or county commissioners liable for all injuries arising from defective highways, in this country would result in two very undesirable conclusions,—the literal abrogation of the office of county commissioner (for no sane man would assume the position, with such a liability attached), and the bankruptcy of every county in the state."

In May v. Ralls County, 31 Fed. Rep. 473, it was said that counties are not liable for failure to keep roads, bridges, or public buildings in repair and in a safe condition, and for injuries sustained in consequence of such neglect on the part of the county officials a suit is not maintainable against th county.

Under N. J. Pub. Laws 1889, p. 58, an act to compel boards of chosen freeholders to acquire, improve, and maintain public roads, where a declaration alleged that it thereby became the duty of the board to maintain a highway in good and safe condition for public use, and that plaintiff was injured while passing along the highway, which was out of repair and in an unsafe condition, it was held that a municipal corporation charged with the performance of a public duty was not liable to an individual for neglect to perform or negligence in the performance of such duty, whereby a public wrong has been done for which an indictment will lie, although such an individual has suffered special damages thereby, and this exemption was put on the ground of ancient precedent and public policy. But the other count of the declaration, that said board wrongfully and illegally made a deep excavation in a public highway under the control

fendant liable for injuries sustained by the plaintiff while operating a steam mangle in the laundry of an insane asylum, the doctrine was plainly asserted of the nonliability of counties and of other municipal corporations for the acts of their officers when engaged in the discharge of public duties, and to that extent exercising acts of sovereignty. This doctrine of nonliability, resting as it does upon the principle that the grant of power is to the county in its political character, and as a means of the exercise of the sovereign power in measures of public interest and for the public benefit, is illustrated in various decisions of this court where the question arose as to the liability of a city for corporate acts resulting, through a negligent performance, in injury to individuals.

With respect to such a municipal corporation proper as a city, the rule of law is well settled by frequent adjudications that the grant by the legislature of a city charter authorizing and requiring a city to perform certain duties renders it liable to a private action for neglect in their performance, when a county or town would not be so liable. A distinction exists between such a corporation, which is created by charter, and is granted the power to own and to manage private property, and is invested with particular franchises, and a municipal corporation, which is created for the purposes of state government, and to exercise, as one of its civil divisions, certain of its political powers. In the case of the former, its responsibility depends upon the nature of the powers exercised. Nelson, Ch. J., in *Bailey* v. *New York*, 3 Hill, 531, 38 Am. Dec. 669, discusses the powers of cities as municipal corporations, but the discussion is not without its usefulness to the present case. He laid down the doctrine (which has been followed in subsequent decisions in this court) that a clear distinction exists between the powers which belong to a city as a municipal body. He observed that, if they were "granted for public purposes exclusively, they belong to the corporate body in its public, political, or municipal character. But if the grant was for purposes of private advantage and emolument, though the public may derive a common benefit therefrom, the corporation, *quoad hoc*, is to be regarded as a private company. It stands on the same footing as would any individual or body of persons upon whom the like special franchises had been conferred." This doctrine was reiterated in *Lloyd* v. *New York*, 5 N. Y. 369, 55 Am. Dec. 347, and in *Maxmilian* v. *New York*, 62 N. Y. 164, 20 Am. Rep. 468, Folger, J., in the latter case, expounding the nature of the duties imposed upon a municipal corporation, said: "One is of that kind which arises from the grant of a special power, in the exercise of which the municipality is as a legal individual; the other is of that kind which arises, or is implied, from the use of political rights under the general law, in the exercise of which it is as a sovereign. The former power

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of said board, into which the plaintiff while lawfully passing along the highway fell and was injured, disclosed a special injury inflicted on plaintiff by a common public nuisance, created, not by the defendant's neglect, but by its active wrongdoing, and there was no reason arising out of public policy why municipal corporations should be shielded from liability when a private injury was inflicted by their wrongful act as distinguished from mere negligence, and that count charged a cause of action. Hart v. Union County Chosen Freeholders, 57 N. J. L. 90.

A recovery was allowed against a county where a minor child was killed while riding a horse, his death being caused by the bad condition of the county road. It was held that the care and caution required of a traveler on a public road were such as persons of common prudence ordinarily exercised. Hartford County Comrs. v. Hamilton, 60 Md. 340, 45 Am. Rep. 739.

Under Md. act 1853, chap. 239, § 1, constituting and declaring the county commissioners a corporation and body politic, and providing that they shall have charge of and control over the property owned by the county, and over county roads and bridges, a county was held liable for injuries caused by a defective road. In this case the case of Russell v. Devon County, 2 T. R. 661, was distinguished, as in that case the county was not a corporation for that purpose and had no corporate fund. The liability was placed on the same ground as that of a city. Anne Arundel County Comrs. v. Duckett, 20 Md. 468, 83 Am. Dec. 557.

And where the plaintiff was injured by falling off of an unprotected precipice on the edge of a road, an instruction that if he traveled on a dark night walking on the edge of the road without a light, and voluntarily took the dangerous edge, when by taking the middle of the road he could have avoided the accident, he could not recover, was properly rejected, as the question of contributory negligence was one for the jury. The county was liable for injuries caused by an unguarded precipice on a road where such road was negligently constructed and left to remain by the defendants in an unsafe condition for travelers, where the plaintiff used due care and caution and was injured. Alleghany County Comrs. v. Broadwaters, 69 Md. 533.

So, a county was liable for injuries caused to a wagon and carriage by a defective road through the negligence of the supervisor, and this liability was not changed by Md. act, 1868, § 8, directing the commissioners to require the road supervisors to give bond to the state, which bond may be put in suit for the benefit of any person suffering by the neglect of said supervisors, as this does not take away the right of action against the commissioners of a county. An instruction that no recovery could be had against a county for injuries from a road out of repair, if the injuries could have been avoided by using another road in a good condition but a short distance further, was erroneous as it did not state that there was any knowledge on the part of the plaintiff that one road was dangerous and the other was safe. Calvert County Comrs. v. Gibson, 36 Md. 229.

A county was liable for injuries caused by a defective highway through improper work done under the supervision of the county officials, under S. C. Gen. Stat. § 1087, providing that counties are liable for injuries caused from defective highways and bridges. This statute was not unconstitutional in that it deprived counties of their property without process of law, or that it denied to counties the equal protection of the law, or that it subjected counties to restraints other than are laid upon other corporations under S. C. Const. art. 1, § 12, or that it imposed a new obligation upon counties for the benefit of another class of citizens when they are guilty of no neglect of duty. Blum v. Richland County, 38 S. C. 291.

But under S. C. Gen. Stat. § 1087, providing that any person who shall receive bodily injury or damage in his person or property through a defect in the repair of a highway, causeway, or bridge may recover in an action against the county the amount

is private, and is used for private purposes; the latter is public, and is used for public purposes. . . . Where the power is intrusted to it as one of the political divisions of the state, and is conferred, not for the immediate benefit of the municipality, but as a means to the exercise of the sovereign power for the benefit of all citizens, the corporation is not liable for nonuser, nor for misuser, by the public agents." The principle that a city, as a municipal corporation, is held to a strict liability to respond in damages, at the suit of a private individual, for its negligence in the maintenance of its streets and other properties, was thus explained by Selden, J., in *Weet* v. *Brockport*, 16 N. Y. 162, footnote: "The surrender by the government to the municipality of a portion of its sovereign power, if accepted by the latter, may with propriety be considered as affording ample consideration for an implied undertaking, on the part of the corporation, to perform with fidelity the duties which the charter imposes." The reasoning of these cases has its pertinency to the present case. The county law of 1892, in denominating a county as a municipal corporation, specifies the purpose to be that of "exercising the powers and discharging the duties of local government and the administration of public affairs;" and, prior to the enactment, it existed to perform just such governmental functions.

I think that the principle of our decision must necessarily be this: "That as the counties of this state were bodies corporate, for certain specific purposes, before the enactment of the county law of 1892, now that they are declared thereby to be municipal corporations their liability for corporate acts is no further enlarged than what may be clearly read in, or implied from, the statute. Their becoming municipal corporations in name imports no greater liability, because by the 3d section of the law their liability for injuries is confined by the language to that which was existing. The liability remains as it was,—neither greater nor less. No new duty or burden has been imposed upon counties in respect to the maintenance of bridges over navigable boundary streams. The duty which always existed for public purposes and for the public benefit is continued. The work of maintaining the bridge in question was properly charged upon the counties, because it could be more advantageously performed by them than by the towns. Towns themselves were not liable for damages arising from defective highways and bridges until, by an act of the legislature in 1881, the liability which formerly rested upon the commissioners of highways was transferred to them. If it was necessary, in order that towns might be made liable in private actions, that there should be such legislation, it is as necessary, I think, that there should be some express legislation, in order to impose the liability upon a county which did not previously exist. The object of the county law of 1892, in my judgment, in declaring the county a municipal corporation,

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of damage fixed by the finding of the jury, a recovery cannot be had where the injury occurred on a road under a railway trestle, which was a divergence from the county road because the county road was very rough, although this road had been improved some by the overseer of the road hands without any authority, as act 1883, 18 Stat. at. L. 631, providing for appointing commissioners and employing a surveyor to change the location of a highway, was the only law prescribing the mode of making a change, and the act of the overseer in this case was without lawful authority, even if it could be assumed that the county commissioners approved of this change. Hill v. Laurens County, 34 S. C. 141.

And under this act a recovery could not be had where the injury arose from a defective ferry boat operated by the county, as a ferry boat was not a highway within the intention of the statute. Chick v. Newberry & Union Counties, 27 S. C. 419.

In Smith v. Kanawha County Ct. 33 W. Va. 713, 8 L. R. A. 82, it was held that under W. Va. Code 1887, chap. 43, § 7, providing that the road surveyor shall cause the roads and bridges to be put in good order and repair to the proper width, the county was not liable where the party was injured while driving on a narrow road and two calves appeared suddenly out of the bushes causing the horse to become frightened and back over a steep bank. It was held that the road was as wide as could be expected at that place with a steep river bank on one side and a slipping hillside on the other. It was further held there was some evidence to show that the plaintiff pulled the horse. The negligence of the driver barred a recovery.

Under W. Va. Code, chap. 43, imposing a liability on counties for injuries sustained by reason of a public road or bridge being out of repair, the county was not liable where about eight days before the injury a landslide came into the road filling it about 4 feet on one side and extending nearly to the other side, and plaintiff attempted to drive over the same and struck a small stone, which tilted the buggy, frightening the horse, causing it to run away, and upset the buggy. The condition of the road was such that it was reckless to drive over it, and contributory negligence barred a recovery. Phillips v. Ritchie County Ct. 31 W. Va. 478.

In this case it was also held that it was unnecessary for the plaintiff to allege or prove that the county had notice of the defect which caused the injury.

Under W. Va. Code 1887, p. 331, chap. 43, providing for an action against a county court to anyone who has sustained injury by reason of a public road or bridge being out of repair, and Code 1868, chap. 43, § 7, p. 267, providing that every surveyor of roads shall cause the same to be put in good repair and to be clear and "kept clear of rocks, falling timber, landslides, and other obstructions," the county was not liable for an injury caused by a dead tree standing within 5 feet of the roadside which fell on the plaintiff and injured him. This law was amended three days after the accident, requiring the surveyor to remove all dead timber standing within 30 feet of the road, and W. Va. Code 1887, chap. 43, § 7, p. 318, and the law prior to the Code of 1868, required the surveyor to keep the roads secure from the falling of dead timber therein. It was held that the omission in the law in existence at the time of the accident indicated that the surveyor was only to pick up falling timber and obstructions, and not to cut it down. It was further held that if it was his duty to cut it down an action would not lie against the county court as there was no statute imposing a liability. Watkins v. Preston County Ct. 30 W. Va. 657.

c. *Where the injury was caused by the fright of a horse.*

In the states where a recovery may be had for injuries from a defective bridge, either on account of implied liability or by statute, a question has been made as to a recovery for an injury caused through the fright of a horse. It seems that

was in order that it might be sued as a legal entity in cases where previously actions were maintainable only in the name of the board of supervisors.

The appellant's counsel attacks the reasoning which distinguishes between counties and chartered municipal corporations in respect to their liability for corporate acts, as being unsubstantial and artificial, and he is able to cite us to some observations by text-writers to that effect. The distinction is none the less real, however, because processes of reasoning might lead to the conclusion that the two classes of corporations should be placed upon a par in their attributes and incidents. The distinction rests upon established conditions of state government, which must endure until the legislature expressly changes them. It has not unfrequently been the case that statutes have so far modified some common-law condition, under which we were governed as a society, as to subject what remained of it to criticism similar to that now indulged in, but the rule is firmly established that the common law has been no further abrogated by a statute than is to be understood from the umistakable import of the language used. *Bertles* v. *Nunan*, 92 N. Y. 152, 44 Am. Rep. 361, presents an interesting discussion, in point, under that head.

The conclusion I have reached after a careful consideration of the subject is that in the work of construction of this bridge the board of supervisors were executing a certain public duty, imposed upon them as the proper public agents in that particular civil division of the state, and that the county could not be subjected to a private action for injuries occurring in, or by reason of, the performance of the work. I do not think it is consonant with the reason of the rule of law which concedes to the sovereign power in government an exemption from liability that a private individual may have a right of action against those who have but exercised a lawful power which was vested in them by the legislative body for the public convenience and welfare, and not for any private benefit of the corporate body.

The judgment appealed from should be affirmed, with costs.

Bartlett and **Martin, JJ.**, dissenting:

Where the duty to construct a highway or bridge is imposed by law upon a county, we see no reason why, in case of negligence and consequent injury to the citizen, there should be any substantial difference as to liability between counties and cities, as the former, like the latter, are now municipal corporations. The county, in the performance of this duty, is clothed with a special power, not intrusted to it as a political division of the state in the exercise of the sovereign power for the benefit of all citizens, but strictly in the interest of the municipality.

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where the injury would not have happened if there had been sufficient railing, the liability was allowed, but on this there is some little conflict, and a case in Indiana held that where the horse was frightened at the defective bridge and overturned the buggy a recovery was denied.

Under an Oregon statute, providing for an action against the county for injuries to the rights of plaintiff arising from some act or omission, a county was liable where a horse became frightened because a plank was broken, and caused the other horse to go over a bridge which was unprotected. Eastman v. Clackamas County, 32 Fed. Rep. 24.

And under a statutory liability to travelers from defective bridges a recovery was had where a horse was frightened by a hole in the bridge, and backed the buggy over into the stream below, and there were no banisters or railings. There was no question made in the case as to the proximate cause being fright. Cook v. De Kalb County, 95 Ga. 218.

Where the plaintiff's horse took fright and backed her buggy off the approach to a bridge which had no guards or railings, the county was liable if the chairman of the board of county commissioners had notice of the defect and it was a county bridge. The question of contributory negligence was one for the jury, and the court did not discuss the question of fright. Nemaha County Comrs. v. Allbert (Kan. App.) 51 Pac. 307.

Where plaintiff attempted to cross a small bridge which was out of repair, and his mules became frightened, and he was injured, an instruction that if the accident was caused by the fright of the mules the verdict must be for the defendant, unless the fright was caused by a defect in the road manifestly calculated to frighten horses of ordinary gentleness, and the defendants by the use of ordinary care and diligence might have known of the same in time to repair it, was erroneous in stating that the plaintiff was not entitled to recover under any circumstances unless the fright of the mules was caused by failure of duty on the part of the defendants. It was said that the fright of the mules did not necessarily imply any negligence or culpability on the part of the plaintiffs, and it was error to direct the attention of the jury to this sole inquiry without considering anything else. Kennedy v. Cecil County Comrs. 69 Md. 65.

And the fact that the conduct of the horse might have been one proximate cause of an injury from the failure to have railings on a bridge would not prevent the county from being liable if its negligence was also a proximate and concurring cause of the injury. Parke County Comrs. v. Sappenfield, 6 Ind. App. 577, 10 Ind. App. 609.

A county was liable for injuries resulting from a defective county bridge, where a hole in the bridge was covered by a stone which frightened plaintiff's horses, and there were no barriers on the approaches to protect the same. Moreland v. Mitchell County, 40 Iowa, 394.

And a county was liable where a horse was frightened at a pile of rocks on a road, and backed the buggy over an unprotected approach to a bridge, where the fall of the horse and the accident were simultaneous. Rohrbough v. Barbour County Ct. 39 W. Va. 472.

So, a county was liable for injuries caused by failure to keep a bridge in repair where a horse was frightened at a crooked log placed at the corner of the bridge to keep the earth from washing away, and there was no railing. Sullivan County Comrs. v. Sisson, 2 Ind. App. 311.

So, where the horse shied and death was caused by want of a railing over a county bridge, a recovery was allowed, in Shelby County Comrs. v. Blair, 8 Ind. App. 574.

In Boone County Comrs. v. Mutchler, 137 Ind. 140, it was said that a county was liable where plaintiff's horse was frightened at a hog in a ditch on a free gravel road, and backed the buggy over the side of the bridge where there was no railing. The court said: "It is quite certain that the injury in this case would not have been caused had there been proper guards upon the bridge. And if it be conceded that the fright of the horse and the defect in the bridge were concurrent causes of the injury,

INDIANA SUPREME COURT.

BOARD OF COMMISSIONERS OF JASPER COUNTY, *Appt.*,
v.
John L. ALLMAN, Admr., etc., of Reuben P. Ryan, Deceased.

(142 Ind. 572.)

1. Counties, being subdivisions of the state and instrumentalities of government exercising authority given by the state, are no more liable for the acts or omissions of their officers than the state.

2. A county is not liable by implication for damages caused by negligence of its officers in respect to keeping bridges in repair, where the county commissioners have no power to appropriate county funds for that purpose except when and so far as the road district is unable to make the repairs, and there is no statute giving a right of action against the county for its negligence or that of its commissioners, or authorizing the use of county funds to pay damages caused thereby.

3. It is the duty of the court to overrule a decision or series of decisions if clearly incorrect either through a mistaken conception of the law or through misapplication of the law to the facts, if no injurious results would follow from their overthrow.

(November 25, 1895.)

APPEAL by defendant from a judgment of the Circuit Court for Newton County in favor of plaintiff in an action brought to recover damages for the death of plaintiff's intestate which was alleged to have been caused by a bridge which defendant had allowed to become defective. *Reversed.*

The facts are stated in the opinion.

Messrs. **S. P. Thompson** and **Stuart Brothers & Hammond**, for appellant:

While the statute makes it the duty of the county board to cause the bridges of the county to be kept in repair, the county is not liable for injuries caused by defects in such bridges for the reason that there is no statute imposing such liability.

Cones v. *Benton County Comrs.* 137 Ind. 404; *Bailey* v. *Lawrence County*, 5 S. D. 393.

The rule of *stare decisis* cannot properly be invoked as a reason for following the line of decisions which hold counties liable in such cases.

Certainly no one would have a right to incur a risk to his person from a defective bridge on the strength of decisions holding the county liable in such cases. The fact that he did so would be a most conclusive reason why he could not recover.

23 Am. & Eng. Enc. Law, p. 36.

If the deceased knew, as he is presumed in the absence of an averment to the contrary to both present and active in the result, yet, as neither party was to blame for the fright of the horse, and as the appellant was alone to blame for the defect in the bridge, it is quite evident that the appellant cannot escape responsibility. Fulton County Comrs. v. Rickel, 106 Ind. 501; Shelby County Comrs. v. Sisson, 2 Ind. App. 311."

But a county was not liable for injuries caused by a horse becoming frightened at a pile of lumber on a road and running away, as the county was not liable for defective roads. Abbett v. Johnson County Comrs. 114 Ind. 61.

In Fulton County Comrs. v. Rickel, 106 Ind. 501, it was held that a county was not liable for injuries caused by a horse becoming frightened at a plank standing upright in a bridge, as an injury caused by the horse's fright was not the proximate result of a breach of duty, and no greater duty is imposed upon counties in respect to bridges than that of using ordinary care and diligence to make and keep them safe for travel. In this case the frightened horse caused the carriage to upset and there was no question made as to defective railing, but fright of the horse at the defective bridge seems to have been the cause.

And a county was held not liable for injuries caused by a runaway team to a foot passenger on account of failure to erect proper barriers over a long and narrow county bridge in a large city, where the bridge was a solid stone bridge in good repair erected fifty years previous and sufficiently adequate at that time. It was further held that the commissioners were not negligent in anticipating that horses would become frightened on a wagon road and injure foot passengers; also that Pa. act February 18, 1870 (Pub. Laws, 191), providing that the commissioners of L. county are authorized to erect foot sidewalks adjoining the stone bridge at the expense of the county, was discretionary and not mandatory, for which there would be no liability. Lehigh County v. Hoffort, 116 Pa. 119, 19 W. N. C. 383.

In South Carolina there is a statute imposing a liability, but where the proximate cause of the accident was the fright of a horse the county would not be held liable. Brown v. Laurens County, 38 S. C. 282.

A county was not liable under a statute requiring roads to be kept in good repair, where a horse was frightened by two calves coming out of the bushes, and backed over a steep bank. There was some evidence to show that the plaintiff was guilty of contributory negligence. Smith v. Kanawha County Ct. 33 W. Va. 713, 8 L. R. A. 82.

And under a statute imposing a liability for roads and bridges being out of repair a county was not liable where plaintiff attempted to cross a landslide on the road, and his horse ran away, as the driver was reckless. Phillips v. Ritchie County Ct. 31 W. Va. 478.

And where a horse was being driven on a buggy across a public bridge, and as he put his fore feet on the bridge became frightened by a large hole under the bridge, and, backing, threw the buggy over the edge of the approach to the bridge, and the timbers there, being rotten, gave way with the rocks and rolled down upon the plaintiff and injured him, no recovery could be had, as the injury was not received because of the hole under the end of the bridge, but from the fright of the horse. Mason v. Spartanburg County, 40 S. C. 390.

Under S. C. act, 1874, Gen. Stat. § 1087, providing that any person who shall receive injury in his person or property through a defect in the repair of a highway, causeway, or bridge, may recover in an action against the county, a county was not liable where a mule, drawing a buggy, became frightened at a placard advertisement on a bridge, and backed against the railing, which gave way and the vehicle was thrown over the bridge, and the commissioners as soon as they knew of the placard had it removed. Nor was it error to ask the jury, "Would a prudent man have driven his mule across the bridge, with two ladies in his buggy, with the sign staring him

See also 47 L. R. A. 480.

have known, of the dangerous condition of the approach as described, and attempted to cross it on a load of hay, as averred in the complaint, and met with his death by the wagon slipping off the grade, which was "so narrow on top as to be dangerous for travelers and persons to pass and drive over," he was guilty of such contributory negligence as precludes a recovery.

Jonesboro & F. Turnp. Co. v. *Baldwin*, 57 Ind. 86; *Indianapolis* v. *Cook*, 99 Ind. 10; *Morrison* v. *Shelby County Comrs.* 116 Ind. 431; *Wilson* v. *Trafalgar & B. County Gravel Road Co.* 83 Ind. 326; *Albion* v. *Hetrick*, 90 Ind. 545, 46 Am. Rep. 230; *Riest* v. *Goshen*, 42 Ind. 339; *Wabash, St. L. & P. R. Co.* v. *Johnson*, 96 Ind. 40; *Gosport* v. *Evans*, 112 Ind. 133; *Horton* v. *Ipswich*, 12 Cush. 488; *Lake Shore & M. S. R. Co.* v. *Pinchin*, 112 Ind. 592; *Ohio & M. R. Co.* v. *Walker*, 113 Ind. 196.

A county, like a state, is not liable for the negligence of its agents and officers, unless made liable by a statute.

Morris v. *Switzerland County Comrs.* 131 Ind. 285; *Vigo County Comrs.* v. *Daily*, 132 Ind. 73; *Smith* v. *Allen County Comrs.* 131 Ind. 116; *Cones* v. *Benton County Comrs.* 137 Ind. 404; *Parke County Comrs.* v. *Wagner*, 138 Ind. 609; *Vermillion County Comrs.* v. *Chipps*, 131 Ind. 56, 16 L. R. A. 228.

The county is only liable when a bridge is so out of repair that it is in fact not what its appearance indicates.

In this case the width of the bridge and its approaches, their relative height from the ground and the stream, were matters of the original plan, survey, and estimate. The plan was adopted by the board as one in its opinion suitable to the width of the highway, the banks of the stream, the extent of the travel, and all the circumstances; and this political determination of the board cannot certainly be changed at the behest of the circuit court or a petit jury of another county.

The liability must be limited to one class of persons also, to wit, travelers using due care in entering upon and passing over the bridge needing repair.

O'Connell v. *Lewiston*, 65 Me. 34, 20 Am. Rep. 673; *Mauch Chunk* v. *Kline*, 100 Pa. 119, 45 Am. Rep. 364; *Schaefler* v. *Sandusky*, 33 Ohio St. 246, 31 Am. Rep. 533; *Taylor* v. *Yonkers*, 105 N. Y. 202, 59 Am. Rep. 492.

Messrs. **R. W. Marshall, Cummings & Darroch,** and **Brown & Hall,** for appellee:

In *Parke County Comrs.* v. *Wagner*, 138 Ind. 609, the court uses the following language: "We are unable to recede from the position of this state upon the question [liability of counties for defective bridges], since that position has been so often assumed that it has become a part of 'the law of the land,' and if hereafter departed from it must be by legislative direction," and in support of this proposition cites the following cases:

Vigo County Comrs. v. *Daily*, 132 Ind. 73; *Vermillion County Comrs.* v. *Chipps*, 131

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in the face?" This was not a charge on the fact within the provisions of the Constitution, art. 4, § 26, as the violation would be in the judge deciding a fact about which there was a dispute, and so instructing the jury. Acker v. Anderson County, 20 S. C. 495.

d. *By negligence of employee.*

Counties are not liable to travelers for injuries caused by negligence of employees, in the absence of a statute imposing such liability.

So, the county commissioners were not liable for an injury sustained by a person driving on the county road by reason of a tree falling upon him through the negligence of a laborer employed by the road supervisors, under Md. act 1876, chap. 354, authorizing the appointment of a road supervisor by commissioners, who fix the price paid by the supervisors, but do not contract with the laborer. It was held that a laborer employed by the supervisor was not the servant of a county commissioner. Arundel County Comrs. v. Duvall, 54 Md. 350, 39 Am. Rep. 393.

And where a cart driven negligently by a convict of the chain gang collided with plaintiff's buggy the county was not liable. Va. Code 1873, chap. 45, § 13, providing that counties may sue and be sued, did not impose any liability, as this provision applied to contracts. Fry v. Albemarle County, 86 Va. 195.

And under S. C. act 1874 (Gen. Stat. 1087), providing liability for defective highways, causeways, and bridges, a county was not liable for loss of a wagon and mule from the sinking of a ferry boat, as this was not within the terms of the statute. Chick v. Newberry and Union Counties, 27 S. C. 419.

II. *Injuries to other persons.*

a. *From condition of buildings.*

1. *Generally.*

In the absence of a statute counties are not liable for personal injuries caused by reason of negligence in the construction or maintenance of public buildings.

So, a county was not liable for personal injuries sustained by reason of the defective construction of its court-house, and the failure to keep it properly lighted at night. It was said that the question is similar to that of liability for a county bridge but that the doctrine of the liability of a county would not be extended. A distinction was made that under the Iowa Code, § 303, the board of supervisors are empowered to build and keep in repair the necessary buildings, and this imposes an involuntary duty to provide a place for holding court. But under the Code, § 303, subd. 18, providing that the board of supervisors shall have power to provide for the erection of bridges which may be necessary to keep the same in repair, the counties are not absolutely required to build any bridge, and when they elect to build a bridge there is a duty incurred which renders them liable for negligence. Kincaid v. Hardin County, 53 Iowa, 430, 36 Am. Rep. 236.

And a county was not liable for injuries caused to a witness in attendance upon court who was injured by reason of negligence in not properly lighting the stairway in the court-house. It was held that Ohio act March 12, 1853, § 7 (Swan's Rev. Stat. 181), providing that the boards of commissioners in the several counties shall be capable of suing and being sued, did not constitute or declare the county or the board of county commissioners a body corporate, and made no provision for claims against the county for torts. Hamilton County Comrs. v. Migbels, 7 Ohio St. 109.

And a county was not liable where the plaintiff, then but eight years old, was injured while attending a school exhibition in the county court-house, and fell from the veranda, which had no railing. It was said that a county is not liable for an injury arising from its neglect, or even its positive act, unless the liability is imposed by statute. Sheppard v. Pulaski County, 13 Ky. L. Rep. 672.

In holding that a county was not liable for damages for personal injury caused by negligence in

Ind. 56, 16 L. R. A. 228; *Morris* v. *Switzerland County Comrs.* 131 Ind. 285; *Smith* v. *Allen County Comrs.* 131 Ind. 116; *Fulton County Comrs.* v. *Rickel*, 106 Ind. 501.

This court has frequently had occasion to sustain the doctrine of *stare decisis*.

Stout v. *Grant County Comrs.* 107 Ind. 343; *Hale* v. *Matthews*, 118 Ind. 527; *Fowler* v. *Wallace*, 131 Ind. 349.

The approaches to a bridge are a part of a bridge, which it is the duty of a county to keep in repair as a part of the structure itself.

Huntington County Comrs. v. *Huffman*, 134 Ind. 4; *Driftwood Valley Turnp. Co.* v. *Bartholomew County Comrs.* 72 Ind. 228; *State, Winterburg* v. *Demaree*, 80 Ind. 519; *Shelby County Comrs.* v. *Deprez*, 87 Ind. 509; Elliott, Roads & Streets, 24.

It is the duty of counties to keep the bridges of the counties in repair, and for failure to do so damages may be recovered for injuries.

House v. *Montgomery County Comrs.* 60 Ind. 580, 28 Am. Rep. 657; *Driftwood Valley Turnp. Co.* v. *Bartholomew County Comrs.* 72 Ind. 226; *Shelby County Comrs.* v. *Deprez*, 87 Ind. 509; *Madison County Comrs.* v. *Brown*, 89 Ind. 48; *Howard County Comrs.* v. *Legg*, 93 Ind. 523, 47 Am. Rep. 390; *Allen County Comrs.* v. *Bacon*, 96 Ind. 31; *Porter County Comrs.* v. *Dombke*, 94 Ind. 72; *Patton* v. *Montgomery County Comrs.* 96 Ind. 131; *Vaught* v. *Johnson County Comrs.* 101 Ind. 123; *Knox County Comrs.* v. *Montgomery*, 109 Ind. 69; *Howard County Comrs.* v. *Legg*, 101 Ind. 479; *Wabash County Comrs.* v. *Pearson*, 120 Ind. 426; *Sullivan County Comrs.* v. *Sisson*, 2 Ind. App. 317.

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

This was an action by appellee to recover damages for the death of his intestate, caused, as is alleged, by a defective approach to a bridge over a watercourse. This action was commenced in Jasper county, and the venue changed to the court below. To the complaint, which is in one paragraph, appellant demurred, for want of facts, which was overruled. An answer of general denial was filed. The cause was tried by a jury. A special verdict was returned, and over a motion for a *venire de novo*, a motion for judgment in favor of appellant on the special verdict, a motion for a new trial, and a motion in arrest, judgment was rendered against appellant for $6,000. Appellant assigns as error the action of the court in overruling the demurrer to the complaint and the motion in arrest of judgment.

Appellant earnestly insist that "there is no liability by counties for injuries caused by the negligence of its officers in constructing or in repairing, or failing to repair, bridges over watercourses, for the reason that there is no statute imposing such liability; the overwhelming weight of authority is to the effect that the duty imposed upon counties to keep bridges in repair does not carry with it an implied liability to answer in damages for injuries sustained from defective or unsafe bridges, and that such liability can only arise from express statutory enactment; that the case of *Cones* v. *Benton County Comrs.* 137 Ind. 404, in effect overruled the former holdings of this court in

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the care and control of a court-house, it was said that counties are involuntary corporations organized as political subdivisions for governmental purposes, and not liable for the negligence of its agents unless made so by statute. It was further said there may be little distinction between the duties in regard to bridges and public buildings, but the rule as to bridges would not be extended. Vigo County Comrs. v. Daily, 132 Ind. 73.

For damages caused by maltreatment of a person committed to jail by the ordinary preparatory to being sent to the lunatic asylum, under Ga. Code, § 1864, providing for proceedings to confine a lunatic at the instance of third persons a county was not liable. It was said that the injured person must sue the jailor, sheriff, or those who maltreated him while in jail. Wilson v. Fannin County, 74 Ga. 818. In this case his limbs were so badly frozen that one leg had to be amputated, and the toes on his other foot were frozen off.

For injuries caused by negligence of the superintendent and building committee appointed by the county board to erect a court-house, where the building fell and killed one of the men, and it was not alleged that the defendants were owners of or had exclusive control of the building, or that the defendants had any power over the plans of the building or the character of the material to be furnished, a recovery was denied because there was no statute imposing a liability. Hollenbeck v. Winnebago County, 95 Ill. 148, 35 Am. Rep. 151.

In Hill v. Boston, 122 Mass. 344, 23 Am. Rep. 332, in a city case it was said of earlier cases that they "have ever since been considered as having established in this commonwealth the general doctrine that a private action cannot be maintained against a town or other quasi corporation, for a neglect of corporate duty, unless such action is given by statute."

In Riddle v. Proprietors of Locks & Canals, 7 Mass. 169, 5 Am. Dec. 35, it was said: "These are in the books sometimes called quasi corporations. Of this description are counties and hundreds in England; and counties, towns, etc., in this state. Although quasi corporations are liable to information or indictment, for a neglect of a public duty imposed on them by law, yet it is settled in the case of Russell v. Devon County, 2 T. R. 667, that no private action can be maintained against them for a breach of their corporate duty, unless such action be given by statute."

In Eastman v. Meredith, 36 N. H. 284, 72 Am Dec. 302, which was an action against a town for personal injuries from a town hall, it was said that "towns and other municipal corporations, including counties in this state, have power, for certain purposes, to hold and manage property, real and personal; and for private injuries, caused by the improper management of their property as such, they have been held to the general liability of private corporations and natural persons that own and manage the same kind of property." (This was not only a *dictum*, but it is questionable whether this doctrine was ever applied to any county in New Hampshire.)

2. *On account of escape from prison.*

Counties are not liable for escape of prisoners in the absence of a statute imposing a liability. In some states there is such a statute and the early Ohio cases affirmed an implied liability, but these cases were overruled.

Under the Connecticut statute providing that if any person lawfully committed to gaol shall break such gaol and make his escape, by reason of the insufficiency of such gaol, the damages sustained by persons by reason of such escape shall be paid by the county, and that nothing in this act shall hinder any person from recovering damage of the

such cases." It must be admitted that the decided weight of authority in such cases is as stated by appellant. From the numerous decisions to the effect claimed, we cite the following: *Cones* v. *Benton County Comrs.* 137 Ind. 404; *Smith* v. *Allen County Comrs.* 131 Ind. 116; *Morris* v. *Switzerland County Comrs.* 131 Ind. 285; *Vigo County Comrs.* v. *Daily*, 132 Ind 73; *Hollenbeck* v. *Winnebago County*, 95 Ill. 148, 35 Am. Rep. 151; *Templeton* v. *Linn County*, 22 Or. 313, 15 L. R. A. 730; *Manuel* v. *Cumberland County Comrs.* 98 N. C. 9; *White* v. *Chowan County Comrs.* 90 N. C. 437, 47 Am. Rep. 534; *Wood* v. *Tipton County*, 7 Baxt. 112, 32 Am. Rep. 561; *Brabham* v. *Hinds County Supers.* 54 Miss. 363, 28 Am. Rep. 352; *White* v. *Bond County*, 58 Ill. 297, 11 Am. Rep. 65; *Hedges* v. *Madison County*, 6 Ill. 567; *Lorillard* v. *Monroe*, 11 N. Y. 392, 62 Am. Dec. 120; *Askew* v. *Hale County*, 54 Ala. 639, 25 Am. Rep. 730; *Granger* v. *Pulaski County*, 26 Ark. 37; *Downing* v. *Mason County*, 87 Ky. 208; *Reardon* v. *St. Louis County*, 36 Mo. 555; *Swineford* v. *Franklin County*, 73 Mo. 279; *Clark* v. *Adair County*, 79 Mo. 536; *Gilman* v. *Contra Costa County*, 8 Cal. 52, 68 Am. Dec. 290, and note on pages 294 and 295; *Barnett* v. *Contra Costa County*, 67 Cal. 77; *Scales* v. *Chattahoochee County*, 41 Ga. 225; *Marion County Comrs.* v. *Riggs*, 24 Kan. 255; *Fry* v. *Albemarle County*, 86 Va 195; *Watkins* v. *Preston County Ct.* 30 W. Va. 657; *Woods* v. *Colfax County Comrs.* 10 Neb. 552; *Hamilton County Comrs.* v. *Mighels*, 7 Ohio St. 109; *Baxter* v. *Winooski Turnp. Co.* 22 Vt. 123, 52 Am. Dec. 84; *Ward* v. *Hartford County*, 12 Conn. 404; *Niles Twp. Highway Comrs.* v. *Martin*, 4 Mich. 557; *Adams* v. *Wiscasset Bank*, 1 Me. 361, 10 Am. Dec. 88; *Mitchell* v. *Rockland*, 52 Me. 118; *Altnow* v. *Sibley*, 30 Minn. 186, 44 Am. Rep. 191; *Dosdall* v. *Olmsted County*, 30 Minn. 96, 44 Am. Rep. 185; *Sussex County Chosen Freeholders* v. *Strader*, 18 N. J. L. 108, 35 Am. Rep. 530; *Cooley* v. *Essex Chosen Freeholders*, 27 N. J. L. 415; *Young* v. *Commissioners of Roads*, 2 Nott & M'C. 537; *Farnum* v. *Concord*, 2 N. H. 392; *Eastman* v. *Meredith*, 36 N. H. 284, 72 Am. Dec. 302; *Morey* v *Newfane*, 8 Barb. 645; *Heigel* v. *Wichita County*, 84 Tex. 392, 31 Am. St. Rep. 63, and note on pages 65 and 66; *Ensign* v. *Livingson County Supers.* 25 Hun, 20; *Albrecht* v. *Queens County*, 84 Hun, 399; *Smith* v. *Carlton County Comrs.* 46 Fed. Rep. 340; *Barnes* v. *District of Columbia*, 91 U. S. 540, 23 L. ed. 440; *Bailey* v. *Lawrence County*, 5 S. D. 393; Cooley, Const. Lim. 6th ed. 301; 1 Dill. Mun. Corp. §§ 25, 26; 2 Dill. Mun. Corp. §§ 996, 997, 999; 4 Am. & Eng. Enc. Law, pp. 364–367, and notes: 15 Am. & Eng. Enc. Law, pp. 1143, 1144, and cases cited in note; 1 Beach, Pub. Corp. § 734; Tiedeman, Mun. Corp. § 325. By common law, the inhabitants of a county were required to repair bridges over watercourses. *Carroll County Comrs.* v. *Bailey*, 122 Ind. 46, 48; *State* v. *Gorham*, 37 Me. 451; *State, Whitall*, v. *Gloucester County Chosen Freeholders*, 40 N. J. L. 302; *State* v. *Hudson County*, 30 N. J. L. 137; *Rex* v. *Oxfordshire*, 16 East, 223. Yet it is settled law that counties were not liable at common law for injuries caused by their negligence in failing to keep such bridges in repair. *Cones*

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persons or out of the estate of such persons who shall break or be aiding or assisting in breaking the gaol or who shall escape, a county was liable for an escape, and it was no defense that the escape was effected through the aid of persons outside, or that the plaintiff could have sued those aiding, where they were insolvent, and plaintiff had no knowledge of them at the time of this suit, and it was not shown that the prisoner had an estate, or that the prisoner was recaptured after suit, or that detention would not avail plaintiff. Clark v. Litchfield County, Kirby, 318. [Note by reporter: "This decision was afterwards reversed in the supreme court of errors."]

And the county was liable for the escape of a debtor by reason of insufficiency of the gaol, under the Connecticut statute providing that if any person lawfully committed to any gaol shall break such gaol and make his escape, the county shall pay all damages. Dutton v. Litchfield County, 1 Root, 450.

So, a county was held liable for special damages caused by the escape of a prisoner through the insufficiency of the "gaol" on execution of the debt. Staphorse v. New Haven County, 1 Root, 125; Hawley v. Litchfield County, 1 Root, 155; Dennie v. Middlesex County, 1 Root, 273; Murray v. Bishop, and Smith v. County Treasurer, 1 Root, 357.

In Sheldon v. Litchfield County, 1 Root, 158, it was said that an action against a county for a prisoner escaping through insufficiency of the gaol was under a statute.

And the county was liable under special damages for the insufficiency of a gaol, whereby a party who had been imprisoned for debt made his escape. Williams v. New Haven County, 2 Root, 23.

But a county was not liable for the escape of a prisoner confined for horse stealing, where it was shown the gaol was sufficient, and the prisoner could not have got out unless he had had assistance from some person outside. Paul v. Tolland County, 2 Root, 196.

In Ward v. Hartford County, 12 Conn. 404, it was said that the only case in which provision is made for redress against a county is where a debtor escapes from prison through the insufficiency of the gaol. "The creditor, by an application to the county court, may procure an order for payment of his debt. [Conn.] Stat. 256, title 42, § 24."

A mandamus was held to be not the proper remedy for a sheriff to hold the county liable for damages which he was compelled to pay for an escape under a ca. sa. owing to the insufficiency of the jail. Governor, Haygood, v. Clark County Inferior Ct. Justices, 19 Ga. 97.

But it was further held in this case that a county was not liable for the escape of a prisoner under a ca. sa. owing to the insufficiency of the jail. It was said that a county is a corporation of the municipal kind or it is not, and if it is a municipal corporation it is not liable for the conduct of the inferior court in not providing a more efficient jail, where it is not shown that they have funds to make it more secure, and a municipal corporation is not liable for the acts or omissions of its officers. The court held that if it was not a municipal corporation it could not have an agent. Governor, Haygood, v. Clark County Inferior Ct. Justices, 19 Ga. 97.

In Haygood v. Inferior Ct. Justices, 20 Ga. 845, on the return of this case to the lower court an amendment setting up that the justices of the inferior court had funds on hand sufficient to repair the jail was denied, and it was held that the sheriff could not recover as he was the legal custodian of the jail, and if it was unsafe it was wrong for him to imprison the debtor there, and if the jail was wholly insufficient it was the same thing as if there

v. *Benton County Comrs.* 137 Ind. 404, and authorities heretofore cited. It is a well-settled proposition that, when subdivisions of a state are organized solely for a public purpose by a general law, no action lies against them for an injury received by anyone on account of the negligence of the officers of such subdivision, unless a right of action is expressly given by statute; that such subdivisions, as counties and townships, are instrumentalities of government, and exercise authority given by the state, and are no more liable for the acts or omissions of their officers than the state. *Cones* v. *Benton County Comrs.* 137 Ind. 404; *Morris* v. *Switzerland County Comrs.* 131 Ind. 285; *Vigo County Comrs.* v. *Daily*, 132 Ind. 73; *Smith* v. *Allen County Comrs.* 131 Ind. 116; *White* v. *Sullivan County Comrs.* 129 Ind. 396; *Abbett* v. *Johnson County Comrs.* 114 Ind. 61, cases cited on page 63; *Freel* v. *Crawfordsville School City*, 142 Ind. 27, 37 L. R. A. 301, *Summers* v. *Daviess County Comrs.* 103 Ind. 262, 53 Am. Rep. 512; *Greene County Comrs.* v. *Boswell*, 4 Ind. App. 133; *Edgerly* v. *Concord*, 62 N. H. 8; *Goddard* v. *Harpswell*, 84 Me. 499, 30 Am. St. Rep. 373, and note on pages 398-402; *Howard* v. *Worcester*, 153 Mass. 426, 12 L. R. A. 160; *Larrabee* v. *Peabody*, 128 Mass. 561; *Clark* v. *Waltham*, 128 Mass. 567; *Hill* v. *Boston*, 122 Mass. 344; *Wixon* v. *Newport*, 13 R. I. 454, 43 Am. Rep. 35; *Finch* v. *Toledo Bd. of Edu.* 30 Ohio St. 37, 27 Am. Rep. 414; *Lane* v. *Woodbury District Twp.* 58 Iowa, 462; *Flori* v. *St Louis*, 69 Mo. 341, 33 Am. Rep. 504; *Bigelow* v. *Randolph*, 14 Gray, 541; *Ford* v. *Kendall School Dist.* 121 Pa. 543, 1 L. R. A. 607, and all authorities cited on the proposition concerning bridges.

In *Vermillion County Comrs.* v. *Chipps*, 131 Ind. 56, 16 L. R. A. 228, this court said: "The decided weight of authority is that, in the absence of a statute upon the subject, a county is not liable for a failure to keep its bridges in repair. Elliott, Roads & Streets, p. 42." It was held by this court in *Smith* v. *Allen County Comrs.* 131 Ind. 116, that a county is not liable for an injury to a servant sustained without his fault while engaged in tearing down one of its bridges, although he worked under the immediate charge of its agent, who was known by the board of commissioners to be incompetent, which incompetency was the proximate cause of the injury. The court said: "A county is a civil or political division of the state, created by general laws to aid in the administration of the government, and in the absence of a statute imposing special duties with corresponding liabilities, is no more liable for the tortious acts or negligence of its officers and agents than the state." In *Morris* v. *Switzerland County Comrs.* 131 Ind. 285, this court held that a county was not liable in an action for damages resulting from a failure of the board of commissioners to keep the jail in a healthy and inhabitable condition. The court said: "The most logical and generally accepted theory is, that political subdivisions, such as counties and townships, are created to give effect to and enable citizens to exercise the right of local self government. *State, Holt*, v. *Denny*, 118 Ind. 449, 4 L. R. A. 65; *White* v. *Sullivan County Comrs.* 129 Ind. 396. Such

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had been no jail. It was said he ought to have conveyed the debtor to the jail of the adjoining county and delivered him to the jailor there.

In Brown County Comrs. v. Butt, 2 Ohio, 348, it was held that a county was liable to a sheriff who had been mulcted in damages for an escape of a debtor owing to the insufficiency of the county jail. It was said that if it was a new question it would have been proper that the action should have been against the county in the first instance to avoid circuity of action for damages for an escape of a debtor from an insufficient jail. But this case was overruled in Hamilton County Comrs. v. Mighels, 7 Ohio St. 109.

In Richardson v. Spencer, 6 Ohio, 13, where a sheriff was sued for the escape of a prisoner taken on an execution, it was held that where the escape resulted from the insufficiency of the jail the sheriff was liable in the first instance to the plaintiff on execution, and a recovery against him clothed him with power to coerce indemnity from the county.

In Hamilton County Comrs. v. Mighels, 7 Ohio St. 109, the case of Brown County Comrs. v. Butt, 2 Ohio, 348, and the *dictum* of Richardson v. Spencer, 6 Ohio, 13, were overruled.

For prisoner's right of action for imprisonment in unhealthful or unfit prison, see Shields v. Durham (N. C.) 36 L. R. A. 293, *note*.

b. *By negligence or wrongful act of employee.*

Counties are not liable for personal injuries caused to persons by reason of negligence or tort of employee.

In the case of HUGHES v. MONROE COUNTY it was held that the county of Monroe was not liable for injuries caused by the operation of a laundry machine, whereby an employee of the County Insane Asylum was injured, under N. Y. Laws 1863, chap. 82, placing the asylum under the board of supervisors, authorizing them to elect a warden, and Laws 1870, chap. 633, making it the duty of the trustees to determine whether an inmate was a charge upon the town, or the city of Rochester or upon the county, as the warden and trustees were in no sense the agents of the county but were public officers. It was also held that the county would not be made liable by caring for insane patients not residing in the county under a contract, or by deriving a revenue in small amount from surplus farm products. The county was held to be a quasi-municipal corporation, and the law of 1892, which provided that a county is a municipal corporation, did not apply because the injury was committed before its enactment. This case is in accord with the authorities generally.

So, a county was not liable where injuries were caused to a servant in the employ of the county working under the personal superintendence of one of the board of commissioners in tearing down a bridge, although it was charged that the superintendent was incompetent, inexperienced, and negligent. Smith v. Allen County Comrs. 131 Ind. 116.

Nor where a convict in the penitentiary was required to work at a circular saw, and he alleged that the injury was occasioned by the illegal and negligent acts of the defendant in compelling him to approach the saw, and in not providing proper means for the execution of the business of the penitentiary. Alamango v. Albany County Supers. 25 Hun, 551.

Nor where an employee of an independent contractor of defendant while carrying lumber to a bridge was injured by reason of a negligent blast of dynamite. It was said that counties are subordinate political divisions of a state, and are not liable for torts of their officers unless made so by statute. Smith v. Carlton County Comrs. 46 Fed. Rep. 340.

subdivisions are instrumentalities of government and exercise authority delegated by the state and act for the state. As the state is not liable for the acts or omissions of its officers, neither should a political subdivision of the state be liable for the acts or omissions of its officers as relating to political powers." *White* v. *Sullivan County Comrs.* 129 Ind. 396, and *Summers* v. *Daviess County Comrs.* 103 Ind. 262, are to the same effect. This court held in *Vigo County Comrs.* v. *Daily*, 132 Ind. 73, that a county is not liable for damages occasioned by the negligence and carelessness of the board of commissioners in the care and control of the court-house. The court said: "It is now well settled that counties are involuntary corporations, organized as political subdivisions of the state for governmental purposes, and not liable, any more than the state would be liable, for the negligence of its agents or officers unless made liable by statute." In *Cones* v. *Benton County Comrs.* 137 Ind. 404, this court held that a county could not be held liable for personal injuries sustained while traveling upon a free gravel road of the county, and by reason of the defects in the construction and repair of such road. The court also expressly declared that the county was not liable at common law for the negligence of its officers, and that no liability existed by statute with reference to bridges. The court said: "It is quite true that the principle adopted in the bridge cases is in perfect analogy to the case before us, and if we would be consistent, those cases would control the present; but we are fully convinced that the principle there adopted, of an implied liability, is not in harmony with the great weight of authority, ancient and modern. . . . The liability did not exist at common law, and does not exist by statute with respect to bridges or highways, and the objections to liability are well stated in *Hollenbeck* v. *Winnebago County*, 95 Ill. 151, 35 Am. Rep. 151, as follows: 'No reason is perceived why a county should be held to respond in damages for the negligence of its officers while acting in the discharge of public corporate duties enjoined upon them by the laws of the state . . . clothed with but few corporate powers, and these not of a private . . . character. . . . In fact, the powers and duties of counties bear such a due analogy to the governmental functions of the state at large that as well might the state be held responsible for the negligent acts of its officers as counties.' . . . It will be found that the authorities upon which cities and towns, as municipal corporations, are held liable for the results of the negligence of official duties make this distinction: That such municipalities are voluntary corporations organized for corporate purposes, and possessing legislative, administrative, and judicial functions not possessed, to the same degree by counties or townships, and that they exercise and enjoy advantages purely local and which are independent of the state, and inure to their benefit as distinguished from that of the state. We are aware that profound jurists do not agree with the doctrine that cities and towns are less governmental subdivisions of the state . . . than counties or townships; but, aside

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And a county was not liable for negligence in not appointing a guardian for, and in not confining, a party who had been found by inquisition to be of unsound mind, who was allowed to run at large and kill her husband. Miller v. Iron County, 29 Mo. 122.

Nor for damages and unskilful treatment received by an indigent sick person while in the county hospital. Sherbourne v. Yuba County, 21 Cal. 113, 81 Am. Dec. 151.

And no recovery could be had for damages caused by negligence of the county physician for the poor in a surgical operation, where it was not shown that the board of commissioners did not exercise care and diligence in his selection. Summers v. Daviess County Comrs. 103 Ind. 262, 53 Am. Rep. 512.

And a county was not liable for injuries caused by one of the guards unlawfully beating a convict in the chain gang, or for the negligence of the rest of the guards in not protecting the convict from the unlawful beating. Hammond v. Richmond County, 72 Ga. 188.

But in Hannon v. St. Louis County, 62 Mo. 313, a county was held liable for negligence in constructing a sewer to the county insane asylum under the superintendence of the county engineer who was present directing the work, where by neglect of the contractor and of the engineer the edge caved in, killing a son of the plaintiff.

In Hannon v. St. Louis County, 62 Mo. 313, it was said: "It would be foreign alike to our purpose and the facts admitted by the demurrer, to question the correctness of the proposition so generally concurred in elsewhere, asserted in Reardon v. St. Louis County, 36 Mo. 555, that quasi corporations, created by the legislature for the purposes of public policy, are not responsible for the neglect of duties enjoined on them, unless the action was given by the statute." It was further said: "In the case at bar, the county of St. Louis was not engaged in the discharge of duties imposed alike by general law on all counties; duties whose performance, if neglected, might have been enforced by appropriate procedure for that purpose; but in the discharge of a self-imposed duty not enjoined by any law. And the test of the latter is this: That the county could not have been compelled to enter on the work for whose performance it contracted."

This injury occurred in 1872, and in 1876 under the Constitution the county of St. Louis became the city of St. Louis or the two corporations were consolidated with double functions, as shown by State, Beach, v, Finn, 4 Mo. App. 347.

III. *Injuries to real property from public improvements.*

a. *Generally.*

The weight of authority is that a county is not liable for injuries to property by reason of bridges, roads, drains, and the like being improperly constructed or out of repair or creating a nuisance. But some cases allow a recovery where a constitutional right is invaded, as where it can be construed to be a taking of private property without compensation, or where the Constitution provides compensation for property damaged.

The cases denying a liability for damages to real property are as follows, and will be found below under the appropriate subheads:

A county was not liable for a nuisance arising from a defective ditch causing overflow. Dashner v. Mills County, 88 Iowa, 401; Green v. Harrison County, 61 Iowa, 311; Nutt v. Mills County, 61 Iowa, 754.

Nor where the bridge abutment diverted the water and washed away land, prior to the Califor-

from the reasons so stated for the support of the distinction, it is plain to us that counties have no such powers as cities or towns to ordain, in a corporate capacity what improvements shall be made, the free choice of agents to make them, and the discretion as to the rate of levy to be made for the same. Nor have counties the express power, nor the power necessarily implied, to raise a fund to pay damages for injuries, unless we imply this power, not from legislative grant, but from the liability implied in any case. General powers are not extended to counties, but the measure of their privileges must be found expressed by, or necessarily implied from, some statute." The doctrine declared in *House* v. *Montgomery County Comrs.* 60 Ind. 580, 28 Am. Rep. 657, and the cases following it, is that the laws of this state concerning the building and repair of bridges imposed the duties upon counties to keep public bridges in such repair that they are reasonably safe for travel, and gave them ample power to provide the means necessary to make such repairs, and that, therefore, there was an implied liability to answer in damages for injuries from a failure to discharge that duty.

But even if the doctrine of implied liability from a duty enjoined, and the provision of means for the performance of that duty, declared and applied in the bridge cases, is a correct and not an erroneous statement of the law, it yet remains for us to determine whether the cases named can be sustained on this ground, to do which we must ascertain whether the legislature has given the boards of commissioners the power, and provided them with the means and instrumentalities, to cause the bridges in their respective counties to be kept in repair; for, unless this has been done, no liability can be implied, even though the doctrine of implied liability is correct.

The 1st section of the act to provide for the erection and repair of bridges (Rev. Stat. 1881, § 2885; Rev. Stat. 1894, § 3275), provides that, "whenever in the opinion of the county commissioners the public convenience shall require that a bridge shall be repaired or built over any watercourse, they shall cause survey and estimate therefor to be made, and direct the same to be erected." The 2d section (Rev. Stat. 1881, § 2886; Rev. Stat. 1894, § 3276), provides: "If the estimate therefor shall exceed the ability of the road district in which such bridge is to be built, by the application of its ordinary road work and tax, to perform, the county commissioners may make an appropriation from the county treasurer to build or repair the same." The 3d section (Rev. Stat. 1881, § 2887; Rev. Stat. 1894, § 3277), enacts that "such board shall receive and appropriate all donations for the erection and repair of bridges; they shall also aid the same, when of general importance, by advances from the county treasury, and shall make such regulations in reference to payments and kinds of bridges as to them shall seem proper; provided, however, that if the board of commissioners of any such county shall not deem any such bridge of sufficient importance to make an appropriation from the county treasury for the

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nia Constitution providing compensation for property damaged. Crowell v. Sonoma County, 25 Cal. 313.

Nor where a bridge caused an overflow of plaintiff's land. Davis v. Ada County (Idaho) 47 Pac. 93.

Nor where building a jail obstructed a stream flooding plaintiff's premises. Downing v. Mason County, 87 Ky. 208.

Nor where a highway was built so as to cause overflow of water on plaintiff's land. Grimwood v. Summit County Comrs. 23 Ohio St. 600.

Nor where a dam was injured by the fall of a bridge which washed against it. Livermore v. Camden County Chosen Freeholders, 29 N. J. L. 245, 31 N. J. L. 507.

Nor where damages were caused to a mill dam by flooding, and plaintiff depended on the bridge approach to retain water. Jernee v. Monmouth County Chosen Freeholders, 52 N. J. L. 553, 11 L. R. A. 416.

Nor where an overflow was caused by putting an insufficient drain in the road. Packard v. Voltz, 94 Iowa, 277.

So, where an obstruction of a stream was caused by the manner in which the contractor built the bridge, the county was not liable. Smith v. Wilkes and McDuffie Counties, 79 Ga. 125.

And building a road so as to obstruct a mill race gave no right of action. Swineford v. Franklin County, 73 Mo. 279; Walter v. Wicomico County Comrs. 35 Md. 385.

A county was not liable for a nuisance arising from the condition of a jail. Webn v. Gage County Comrs. 5 Neb. 494, 25 Am. Rep. 497; Threadgill v. Anson County Comrs. 99 N. C. 352.

Nor for a nuisance resulting from a privy being out of repair. Mobley v. Carter County, 5 Ky. L. Rep. 694.

And an injunction was refused against a nuisance anticipated from erecting a jail. Burwell v. Vance County Comrs. 93 N. C. 73, 53 Am. Rep. 454.

Where a road was vacated no recovery could be had for injury to adjacent property, under Iowa Const. art. 1, § 18, providing that private property shall not be taken for public use without compensation. Brady v. Shinkle, 40 Iowa, 576; Ellsworth v. Chickasaw County, 40 Iowa, 571.

And where a road was vacated it was held that property was not "taken for public use." Coffey County Comrs. v. Venard, 10 Kan. 95.

Trespass in opening a road through plaintiff's land gave no right of action against the county. Hutchison v. Pulaski County, 11 Ky. L. Rep. 117.

A county was not liable for a barn damaged by fire through negligence of an employee of a county. Field v. Albemarle County (Va.) 20 S. E. 954.

Nor for fire started on the county poor farm. Symonds v. Clay County Supers. 71 Ill. 355.

In Fenton v. Salt Lake County, 3 Utah, 423, it was held that a county was not liable for injuries to land by the construction of canals diverting a watercourse, where the claim had not been presented to the board.

The cases affirming a liability for injuries to real property by reason of bridges, roads, ditches, and buildings, and for negligence of the county, will be found below under the appropriate subheads.

In SCHUSSLER v. HENNEPIN COUNTY COMRS. a county was held liable for erecting a dam in a lake, destroying a mill dam without compensation.

And for flooding land by reason of bridge abutments, a county was liable under Cal. Const. 1879, art. 1, § 14, providing that private property shall not be damaged for public use without compensation. Tyler v. Tehama County, 109 Cal. 618.

And was liable for damages by building an abutment of a bridge in front of plaintiff's house, un-

erection or repair thereof, the trustee of any township . . . may appropriate any part of the road-tax fund in the township treasury for that purpose, if he shall deem it right and expedient to do so." And § 11 (Rev. Stat. 1881, § 2892; Rev. Stat. 1894, § 3282), provides that "the board of commissioners of such county shall cause all bridges therein to be kept in repair, and shall cause the township superintendent of the proper road district to keep in a conspicuous place, at each end of any bridge in his district whose chord is not less than 25 feet, the following notice in large English characters: 'One dollar fine for riding or driving on this bridge faster than a walk.' And if any person shall ride or drive over any such bridge faster than a walk, for any such offense he shall forfeit and pay $1, to be recovered by the proper town superintendent before any justice of the peace of the proper county, which shall be applied to the repairs of such bridge."

It will be seen from an examination of these sections, which must be construed together, that the power of the board of commissioners to appropriate the county funds for the repair of bridges is limited to certain cases. While the county is required by the 11th section to cause the bridges in the county to be kept in repair, the expense of the same under § 2, unless too great, must be borne by the road district alone, for the reason that the board of commissioners can only make an appropriation out of the county treasury to repair a bridge in cases where the estimates thereof exceed the ability of the road district, by application of its ordinary road work and tax, to perform. If the road district is able, by its ordinary road work and tax, to make the repairs, the board of commissioners has no power to appropriate the county funds to pay for repairing the same. In such a case the board is powerless The supervisor of a road district is a township, not a county, officer, and is not under the control of the county commissioners. He is an independent agent, subject only to the control, in some degree, of the township trustee. Rev. Stat. 1894, §§ 6818–6838. He does not represent the county, and the county is not responsible for his acts. *Dooley* v. *Sullivan*, 112 Ind. 451, 454, 455; *Vigo Twp.* v. *Knox County Comrs.* 111 Ind. 170; *Abbett* v. *Johnson County Comrs.* 114 Ind. 65. Neither has the board of commissioners any power to appropriate the road-tax fund or any other township fund in the hands of the county treasurer, township trustee, or supervisor to pay the expense of said repairs. *Vigo Twp.* v. *Knox County Comrs.* 111 Ind. 170. The board of commissioners might, perhaps, institute an action, and, by writ of mandamus, compel him to make such repairs. Certainly, the county would not be held liable for the failure of the board of commissioners to institute an action against such supervisor, and, by writ of mandamus, compel him to repair a bridge. Under § 3, the board of commissioners have no power to appropriate county funds for the repair of a bridge, unless they deem it of sufficient importance. If they do not deem such bridge of sufficient importance to make an appropriation out of the county funds for its repair, then they have no power

der Pa. Const. 1874, art. 16, § 8, providing for compensation for property taken, injured, and destroyed in the construction of public improvements. Chester County v. Brower, 117 Pa. 647.

And trespass in opening a road through plaintiff's land was held to give a cause of action against the county. Coburn v. San Mateo County, 75 Fed. Rep. 520.

And an injunction would be granted in such a case where no compensation for the taking had been made. McCann v. Sierra County, 7 Cal. 121.

Where a flood injured a dam by reason of improper construction of a bridge abutment, a recovery was allowed. Riddle v. Delaware County, 156 Pa. 643.

Damages were given for a nuisance caused by sewage from a county farm, in Lefrois v. Monroe County, 42 N. Y. Supp. 519. (Pending in court of appeals.)

A county was liable for locating a bridge and constructing the same so that it was carried by a flood against a dam, injuring the same. Harford County Comrs. v. Wise, 71 Md. 43.

And was liable for trespass in removing a vault which was a fixture. Rhoda v. Alameda County, 69 Cal. 523.

b. *By construction and operation of bridges.*

In regard to injuries from locating and building a bridge under the Constitutions of California and Pennsylvania, a recovery has been allowed, and a recovery was allowed in Maryland and Pennsylvania on an implied liability, but it is generally held that a recovery cannot be had.

A county was liable for the construction of a bridge, the abutment of which turned the water against plaintiff's land, although it was claimed that the bridge was built, not upon the highway, but upon private property, and that the acts of the board of supervisors were unauthorized and unlawful. It was held that generally an action did not lie against the county, but Cal. Const. 1879, art. 1, § 14, providing that private property shall not be taken or damaged for public use without just compensation having been first made, authorized a recovery. Tyler v. Tehama County, 109 Cal. 618.

In that case it was said that in Crowell v. Sonoma County, 25 Cal. 313, the county was not held liable, and under the old Constitution that was doubtless true, but the change in the Constitution from Cal. Const. 1849, art. 1, § 8, providing, nor shall private property be taken for public use without just compensation, to Const. art. 1, § 14, providing that private property shall not be taken or damaged for public use without just compensation, created a clear distinction between damages to property and damages for personal injuries.

And a county was liable for consequential damages caused by the erection of the abutment to a county bridge some 14 feet above the grade of the street in front of plaintiff's house in the city, under Pa. Const. 1874, art. 16, § 8, providing that municipal corporations invested with the privilege of taking private property for public use shall make just compensation for property taken, injured, or destroyed in the construction of their work, highways, or improvements, which shall be paid before such taking, injury, or destruction. It was said that prior to the adoption of the Constitution plaintiff would have been without remedy. Chester County v. Brower, 117 Pa. 647.

In an action for injury caused to a dam by a bridge being negligently constructed and located, it was held that a sketch and painting of the scene, showing the location of the bridge, the mill dam and county adjacent, made by an artist who never saw the bridge, was competent evidence, as the jury could have gone in person to inspect the locality. Harford County Comrs. v. Wise, 71 Md. 43.

to make the appropriation, and cannot rightfully do so. It certainly cannot be claimed that, under these sections, the board of commissioners have any general power to make appropriations of county funds for the repair of bridges. Such appropriations can only be made in certain cases and upon certain contingencies; and in cases where they cannot make such appropriation, no way is provided by which they can compel such repairs to be made by the road supervisors, except, perhaps by expensive and frequent litigation, which was certainly not the intent of the legislature.

This act was considered and construed by this court in *Driftwood Valley Turnp. Co.* v. *Bartholomew County Comrs.* 72 Ind. 226, which was an action on a contract made by the county to keep the approaches to a bridge in repair. Worden, J., speaking for the court, said: "The mode in which the county is bound to perform that duty is specifically pointed out by statute and a contract which contravenes that mode and substitutes another must be void. If the contract sued on is valid, and has been broken, the damages of the appellant must be paid out of the county treasury. But it was not contemplated that the expense of repairing bridges should be paid out of the county treasury, except upon a contingency. By the 1st section of the act above set out, when a bridge is to be repaired or built, the commissioners are to 'cause surveys and estimates therefor to be made, and direct the same to be erected.' Why were surveys and estimates to be made? The 2d section answers this question. It is because the appropriation from the treasury depends upon this question whether the estimate exceeds the ability of the road district, by the application to the work of the ordinary road work and tax of the district. It was not contemplated that the expense should be borne by the county treasury, except the excess beyond the ability of the road district. If this contract were to be held valid, the county would have to pay all the expense of the repairs, in the way of damages, no portion falling upon the road district. The contract is in violation of the provisions of the statute and void. The 11th section of the statute, making it the duty of the commissioners to cause all bridges in the county to be kept in repair, must be construed in connection with the 1st and 2d. While the commissioners must cause the bridges to be kept in repair, the expense must be borne by the road district, so far as it is able, according to the the 2d section, and the residue by the county. The 3d section provides that the commissioners shall aid in the erection and repair of bridges, when of general importance, by advances from the

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In an action for negligently constructing and locating a bridge evidence by an expert who examined the remains of the abutment and foundation and mortar, two years after the bridge washed away, in order to testify as to the material and care of the work, was competent. Harford County Comrs. v. Wise, 71 Md. 43.

In that case it was held that skilful construction involved putting suitable materials together in the proper manner upon a site adapted to the structure built and the place where the bridge was built could not be disregarded; and a county was liable where a bridge above a mill was carried away by the flood and injured plaintiff's dam, where the location, condition, and construction of the bridge were negligent, and it was carried away for that reason, although the damage was caused by an unusual height of flood.

And a county was liable where a county bridge on a public highway was constructed so that the abutment interfered with the passage of water in time of flood and injured a mill dam, and it would have been practical to have provided for the flow of water. It was further held that the plaintiff was not guilty of contributory negligence in building a dam at that place, where it was built before any bridge was constructed. Riddle v. Delaware County, 156 Pa. 643.

Under N. J. Rev. p. 86, § 9, providing that when a township or county which is chargeable by law with the erection, rebuilding, or repairing of any bridge shall wrongfully neglect to erect, rebuild, or repair the same, by reason whereof any person shall receive an injury in his person or property, such person may have his action against such municipal body, a county was not liable where the owner of a mill dam depended upon the abutments of an approach to a bridge to retain water, and by reason of defective planking the earth washed away flooding his mill, but the bridge could still be used. Jernee v. Monmouth County Chosen Freeholders, 52 N. J. L. 553, 11 L. R. A. 416.

In Jernee v. Monmouth County Chosen Freeholders, 52 N. J. L. 553, 11 L. R. A. 416, the case of Ripley v. Essex & Hudson Counties Chosen Freeholders, 40 N. J. L. 45, was distinguished, as in that case the bridge owed the duty of providing a sufficient draw for safe passage, but in this case the bridge merely rested upon a dam, and it was only incidentally obliged to maintain the dam far enough to secure its own stability, and the dam belonged to the mill owner.

A county was not liable for injuries caused by placing a bridge abutment so as to divert water and wash away land, under Cal. act 1855 (Wood's Dig. p. 1850), making it the duty of the board of supervisors to divide the county into road districts and to appoint a road overseer who shall cause bridges to be made when necessary, and to keep the same in good repair. It was said that if the bridge was unlawfully placed in the channel by the overseer, the remedy should be against him by whom the injury is committed. Crowell v. Sonoma County, 25 Cal. 313.

But there is now a liability under the present Constitution. See Tyler v. Tehama County, 109 Cal. 618.

And no recovery could be had for damages caused by an obstruction in the stream made by the contractor in building a public bridge. It was not the duty of the county authorities to supervise the work done by the contractor in building a free public bridge over a stream dividing two counties, and the counties were not liable to one having a mill on the stream which was damaged by an obstruction caused by the faulty manner in which the work was executed. Smith v. Wilkes & McDuffie Counties, 79 Ga. 125.

So, in the absence of statutory liability, a county was not liable for damages sustained by reason of negligence in the construction and maintenance of bridges, causing overflow of plaintiff's land. Davis v. Ada County (Idado) 47 Pac. 93.

Under a statute making counties liable for injuries to travelers on account of bridges they were not liable for other injuries.

A county was not liable for injuries caused to stock running at large on account of a defective public bridge, under Ala. Code 1886, § 1546, and Code 1876, § 1692, requiring that bridges erected by contract with the county commissioners shall continue safe "for the passage of travelers and other

county treasury. The contract cannot be upheld by virtue of this section. . . . The obligation to aid by advances from the county is not unconditional, as is seen by the proviso to the section. It depends upon whether or not the board of commissioners shall deem the bridge to be of sufficient importance to make an appropriation from the county treasury for the erection or repair thereof. The duty of the board in making or withholding advances from the county treasury involves a question of judgment as to the importance of the bridge, and this judgment must be exercised as to the importance of the bridge at the time an advance is made. The board could not, by a contract to make advances in the future, preclude itself or its successors from the right and duty to determine, at the time an advance is sought, whether the bridge has the importance required, in order to justify an advance from the county treasury."

It follows, therefore, that the board of commissioners can only cause bridges to be repaired by an appropriation of county funds to pay the expense when the road district is not able by its road work and tax to make the same, and the commissioners deem the bridge of sufficient importance to appropriate the county funds for that purpose, and in such case the expense must be borne by the road district so far as it is able, and the residue by the county. If this is a proper construction of said act,—and it was so decided in *Driftwood Valley Turnp. Co.* v. *Bartholomew County Comrs.* 72 Ind. 226,—the board can in no case pay for repairs out of the county treasury, unless the road district first applies its ordinary road work and tax in making the repairs. Then the board may, if it deem the bridge of sufficient importance, pay the residue out of the county treasury. So that, in all cases where there is a refusal to apply the ordinary road work and tax of the road district in repairing a bridge, the only way they can cause the repairs to be made is by compelling the road supervisors to make such repairs, and no power has been given or adequate means provided by which they can coerce him or any other officer to make such repairs. If it were conceded that when the duty is imposed upon boards of commissioners to cause all bridges to be kept in repair, and they have power to make the appropriations from the county treasury for that purpose, there is an implied liability to respond in damages for an injury resulting from a failure to discharge that duty, yet no such liability could be implied in this state, for the reason that the boards of commissioners have no power to appropriate the county funds for such purpose, except upon a

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persons." Lee County v. Yarbrough, 85 Ala. 590.

An action could not be maintained against the board of chosen freeholders for injuries sustained by a mill dam by reason of the fall of the county bridge under N. J. Laws 1859, chap. 219, § 21, providing that if any damage shall happen to any person by means of the insufficiency or want of repair of any bridge upon any public road the township or county in which the same shall be situated is or shall be liable to make all repairs, and the person sustaining such damage shall have the right to recover the same; as this act was only to secure the repair of roads and bridges for the benefit of travelers, and was not intended to include real estate. Livermore v. Camden County Chosen Freeholders, 29 N. J. L. 245, Affirmed 31 N. J. L. 507.

In New Jersey and Louisiana a county is held liable for negligence in operating a draw bridge, but this liability is denied in New York.

In Houston v. Police Jury, 3 La. Ann. 566, where the plaintiff had passed through a draw bridge controlled by the county, and was prevented from returning by the draw not being opened for the passage of plaintiff's boat, through negligence on the part of those for whose act the parish was responsible, the parish was bound to repair the damage caused thereby. It did not appear that the defendant assumed any right to interfere with or obstruct the navigation of the river, and the obligation to have the draw opened whenever necessary for boats to pass was recognized.

And the board of chosen freeholders of the counties E. and H. were liable for injuries caused to a vessel in not keeping a drawbridge in proper repair, thereby injuring a vessel, under N. J. act March 15, 1860 (Rev. p. 86, § 9), providing that where a township or board of chosen freeholders is chargeable with the erection, rebuilding, or repair of a bridge, any person injured may recover damages against said township or against said board of freeholders. Under act February 27, 1833, requiring the owner of a vessel to lower his sails when approaching a bridge, the jury were properly charged that it was the duty of the commander in approaching the draw to so control his sails—not to take them down, but to lower them—as to enable him to approach the bridge with such diminished speed as would permit the removal of the draw. Ripley v. Essex and Hudson Counties Chosen Freeholders, 40 N. J. L. 45.

Where a steamer was detained upon a river in consequence of the defective construction of a bridge a county was not liable in the absence of any statute. Georgia Const. (Code, § 5152) providing that justices of the peace have jurisdiction over cases of injuries for damages to personal property, did not give jurisdiction to the justice in this case, as this was not damage to the property, but to the company. White Star Line S. B. Co. v. Gordon County, 81 Ga. 47.

And in an action against a county for obstructing navigation of the Tittibawassee river, it was held that the determination that it was necessary to build a bridge across that river, and the whole action of the board in relation thereto, were legislative, and whether any portion was usurpation or not, no action could be maintained against the county for any consequences resulting therefrom, and the same rule would apply as though the bridge was built by the legislature. Larkin v. Saginaw County, 11 Mich. 88, 82 Am. Dec. 63.

An action could not be maintained against a county for negligence in operating a drawbridge, by reason of which an approaching tug was injured. No new liability was created by N. Y. Laws 1892, chap. 686, declaring counties to be municipal corporations, as under that law a county could only be sued upon a cause of action for which it was liable. Godfrey v. Queens County, 89 Hun, 18.

A county was not liable for injuries to a ferry franchise caused by building a bridge connecting another county, at the same place as the ferry, and placing an abutment in the line of the ferry, where there was no authority to build the bridge, under Ind. act May 14, 1869, providing for concurrent action of both counties to build a bridge, and one refused to co-operate. It was held that a county could not be held liable for an unauthorized action resulting in damages. Browning v. Owen County Comrs. 44 Ind. 11.

contingency over which they have no control, and then only when, in their judgment, the bridge is of sufficient importance. It was said in the case of *House* v. *Montgomery County Comrs.* 60 Ind. 580, 28 Am. Rep. 657, that "cities are held liable for failing to keep their streets in repair, though no statute expressly provides for such liability; and in our opinion the principles will apply as well to a county as a city." There is a wide difference, however, between the powers of boards of commissioners with reference to bridges and the powers of cities over the streets. Cities may ordain what improvements shall be made, and how the expense of the same shall be paid, and may choose the agents to make them. The city council may fix the date of its meetings, and may be called in special session by the mayor or five councilmen at any time. The city has officers whose duty it is to keep all the streets in repair, and who have ample authority at all times to act for the city in making such repairs, and who have constant supervision over the streets. The board of commissioners meet in regular session only four times a year,—in March, June, September, and December,—and have no power to meet at any other time except when called in special session by the county auditor, when the public interest requires it; and he is the sole judge of the necessity of such special sessions. Rev. Stat. 1881, §§ 5736, 5737 (Rev. Stat. 1894, §§ 7821, 7822). The auditor is an independent public agent, who does not act for or represent the county, and for whose conduct the county is in no way responsible. *Vigo Twp.* v. *Knox County Comrs.* 111 Ind. 170; *Dooley* v. *Sullivan*, 112 Ind. 451, 454, 455; *Abbett* v. *Johnson County Comrs.* 114 Ind. 65. So that whether the board shall meet in special session to cause a bridge to be repaired depends upon an officer who does not represent the county, and for whose acts the county is not responsible. A county board cannot make a valid contract for the repair of a bridge except when in legal session as a board. Their powers are created and defined by statute. They are agents with limited powers, and for any act done by them not within the scope of their powers the county is not liable. *McCabe* v. *Fountain County Comrs.* 46 Ind. 380, 383; *Cass County Comrs.* v. *Ross*, 46 Ind. 404; *Campbell* v. *Brackenridge*, 8 Blackf. 471; *Potts* v. *Henderson*, 2 Ind. 327; Tiedeman, Mun. Corp. 3. They are authorized by statute to appoint a superintendent to erect a bridge, but

An action could not be brought against the board of county commissioners for injuring plaintiff by depriving him of a bridge and ferry franchise in laying off a public road on his land and erecting a bridge near where plaintiff's bridge was, as under Ga. Const. § 5222, providing that each county shall be a body corporate, and all suits by or against a county shall be in the name of the county, it was held that the action must name it, and not its agent, as defendant. Arnett v. Decatur County Comrs. 79 Ga. 782.

c. *By roads.*

Counties are not held liable for damages caused by vacating a public highway or for consequential injuries to a mill dam in building a road. As to whether a county is liable for trespass committed by a road officer, there is some conflict. A county is not held liable for damages for opening a shunpike road injuring a turnpike company.

Where the board of supervisors vacated a highway, an owner of land situated on the highway, but not upon the part vacated, which commenced about 30 rods from his farm, could not recover damages, under Iowa Const. art. 1, § 18, providing that private property shall not be taken for public use without first compensating the owner therefor. Iowa Code, §§ 941, 946, providing for establishing and vacating roads conditioned upon payment of damages, did not impose a liability as they simply prescribed the proceedings to recover. It was held that a citizen might not be deprived of the right to use an existing highway, but his right to its continuation would be held subject to the exercise of lawful authority, and the citizen had no right to the continuation of the road except such as he held in common with the public. Brady v. Shinkle, 40 Iowa, 576.

And in Ellsworth v. Chickasaw County, 40 Iowa, 571, it was held that an abutting owner could not recover in such a case.

Under Kan. Gen. Stat. (1868), 897, chap. 89, authorizing a county to vacate county roads, a county was not liable to a person who was injured by reason of the commissioners' vacating a county road, as neither the county nor its officers committed any wrong by so doing, nor did they take any person's property. Coffey County Comrs. v. Venard, 10 Kan. 95.

A county was not liable for injuries caused to the owners of a mill by reason of filling up a mill race which crossed a road, in order to prevent injury to the county road. Swineford v. Franklin County, 73 Mo. 279.

In Swineford v. Franklin County, 73 Mo. 279, the case of Hannon v. St. Louis County, 62 Mo. 313, was distinguished, as in that case the county had entered into a contract for the work which resulted in injury to the plaintiff; but if no contract had been made the county could not have been held liable in that case.

A county was not liable for injuries caused to a mill and dam from back water in building a road, where such road was built by a county from which the defendant had been detached, and there was no allegation that the defendant had notice to remove the nuisance or neglected or refused to do so. Walter v. Wicomico County Comrs. 35 Md. 385.

And no recovery was allowed for injuries caused to a mill and dam from back water by reason of a road being built below the same where there was no negligence in the care or construction of the highway, as, when necessary and proper repair on public highways is reasonably and judicially done, the counties are exempt from any action for consequential damages. Walter v. Wicomico County Comrs. 35 Md. 385.

And where damages resulted from the negligent construction of an embankment, in grading a highway, causing the water to overflow plaintiff's land, it was said that Ohio act March 30, 1868 (S. & C. 89), amending act March 12, 1853, § 7 (S. & C. 244), providing that the board of county commissioners may sue for damages done to the property of the county, does not give any liability, and a recovery was denied. Grimwood v. Summit County Comrs. 23 Ohio St. 600.

And a county was not responsible for a trespass committed by a surveyor appointed by the county court, where such surveyor opened a public road through plaintiff's land, throwing his fences, cutting his trees, and destroying his fruits. It was held that neither the state nor its integral counties could be sued for any trespass of their respective

not to keep bridges in repair. Rev. Stat. 1881, § 2888 (Rev. Stat. § 1894, § 3278). When the board is not in session, no one is or can be authorized, as the law now stands, to represent or act for or bind the county in keeping bridges in repair, or in contracting for the repair of the same. *Driftwood Valley Turnp. Co.* v. *Bartholomew County Comrs.* 72 Ind., on pages 239, 240; *Potts* v. *Henderson*, 2 Ind. 327; *People* v. *St. Clair County Officers*, 15 Mich. 85. So that, if the board of commissioners had the power to appropriate the county funds to pay for the expense of repairing bridges in all cases, without any limitations or conditions whatever, they could not exercise that power when not in session; and, as neither they nor anyone representing or acting for the county can call them in special session, most certainly it could not be said, even in that case, with all the powers named, that they had been given the power or provided with the means and instrumentalities necessary to keep the bridges of the county in repair, unless they also, at least, had the power to meet as a board at any time of their own volition.

The authority of the board of commissioners, acting as a board of turnpike directors, in respect to free gravel roads, is much more like the power cities have in regard to streets than is that of the board of commissioners in regard to bridges; and there is therefore much greater reason for holding that the doctrine of implied liability applies to counties with reference to free gravel roads than with respect to bridges. The board of commissioners is by statute constituted a board of turnpike directors, having exclusive management and control of the free gravel roads of the county. The board is required to divide the county into three districts, as nearly equal in number of miles of free gravel road as practicable; and each member is given personal control and supervision over one of such districts, and has the power to keep the same in repair, subject to the rules and regulations of the board. The board fixes the time of its meetings, and is empowered to appoint persons to superintend the work of repairs, and let contracts therefor,—contract for, or condemn and take material for, the repair of such roads, and issue certificates therefor; to cause to be levied and collected taxes to pay for the expense of keeping such roads in repair. These powers have been changed to some extent by the amendment of 1895. Rev. Stat. 1894, §§ 6868-6875, 6912, 6933, 6935, 6950, 6958; Acts 1895, p. 363. Yet, as we have seen,

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officers. Hutchison v. Pulaski County, 11 Ky. L. Rep. 117.

An action would not lie against a county for damages sustained by a turnpike company in laying off a shun-pike public road, a nuisance to plaintiff's rights, the use of which was enjoined. Tenn. Code, § 403, providing that suits may be maintained against a county for any just claim, as against other corporations, did not create any liability, but simply provided the remedy if a liability existed. White's Creek Turnp. Co. v. Davidson County, 14 Lea, 73.

In White's Creek Turnp. Co. v. Davidson County, 14 Lea, 73, it was said that the intimation in Franklin & C. Turnp. Co. v. Maury County Ct. 8 Humph. 355, that an action would lie against a county court in case of a shun-pike, was only a *dictum*.

In Franklin C. Turnp. Co. v. Maury County Ct. 8 Humph. 342, which was an action for an injunction against a shun-pike, it was said that the county would be liable in damages for an action on the case on the part of the corporation.

But where a county claimed that a road had been opened through private property by prescription and use for forty years, and endeavored by the county records to make it of record a public road, and one of the board of supervisors committed trespass in tearing down plaintiff's gate and endeavoring to maintain a road, and the board of supervisors impliedly recognized his actions and approved them by afterwards at his instance declaring such road to be public, an injunction was granted against further trespass, and the county was held liable for damages. Coburn v. San Mateo County, 75 Fed. Rep. 520.

In this case the defendant denied that it had ever ratified the trespass, and the court held that it had, and in its opinion quotes the doctrine from another case that property cannot be taken without compensation, but the judgment is really for enjoining further trespass and for damages.

An injunction was granted against the opening of a road through plaintiff's property by the county, where no proceedings were taken to condemn the same. Cummings v. Kendall County, 7 Tex. Civ. App. 164.

In an action against a county for injury caused by the board of supervisors running a street or thoroughfare through plaintiff's property without making any compensation, which was an action for damages, and for injunction, it was held that under Cal. act March 20, 1855, providing that no person shall sue a county in any case unless his claim has been first presented to the board of supervisors, an action did not lie. It was further held that the claim for damages could not be joined to a bill for injunction. It was said that under the Constitution of California providing that private property shall not be taken for public use without just compensation, an injunction might be granted. McCann v. Sierra County, 7 Cal. 121.

d. *By ditches, canals, and dams.*

In SCHUSSLER v. HENNEPIN COUNTY COMRS. where the county, by erecting a dam in a lake, destroyed the use of a mill, and pleaded that its acts were lawful under a power given by a special statute, and the attorney for the county claimed the act was unconstitutional, and that the acts complained of were *ultra vires*, but the board of commissioners upheld and ratified the acts from which the injury arose, the court declined to pass upon the unconstitutionality of the act, but based the opinion upon the concession of the defendant's counsel, and the county was held liable. The court says: "If valuable property rights can thus be taken, destroyed, diverted, and injured without compensation, there will be but little safety in the private ownership of property," and held that the county was liable where it had adopted, assumed, and ratified the act complained of, and granted a mandatory injunction lowering the dam, and a judgment for damages already accrued. This case can be sustained on the theory of liability for taking property without due compensation.

It is generally held that counties are not liable for damages to real property caused by ditches affecting adjoining property.

A county was not liable for damages from a ditch which had been abandoned and become a nuisance and caused overflow of plaintiff's land, which ditch was constructed under Iowa Code, § 1207, authorizing the construction of ditches whenever the same will be conducive to the public health and convenience or welfare. It was said that a county was not liable for negligently constructing or failing

this court held in *Cones* v. *Benton County Comrs.* 137 Ind. 404, and we think correctly,—that there is no implied liability against the county in favor of one injured by reason of a failure to keep a free gravel road in repair. It is the duty of township trustees and road supervisors at all times to keep the bridges in repair, and protect them from injury, Rev. Stat. 1894, §§ 6818, 6832–6838; *Carroll County Comrs.* v. *Baily*, 122 Ind., on pages 49, 50. They also have the power to construct bridges. Rev. Stat. 1894, §§ 3276, 3277, 6833 (Rev. Stat. 1881, §§ 2886, 2887); Acts 1885, p. 202, § 3. And the township trustee has the power to levy an additional road tax, and expend the same, as well as the ordinary road tax, in the construction and repair of bridges. Rev. Stat. 1894, § 6834; Acts 1885, p. 202, § 4. The township trustee had no power to levy an additional road tax to be used for the construction and repair of bridges until the act of 1885 was passed. Prior to that date, only the ordinary road tax was used for that purpose. Rev. Stat. 1894, §§ 3276, 3277 (Rev. Stat. 1881, §§ 2886, 2887). For each failure of the road supervisor to perform his duty as required by law, he is liable to a penalty of $10, to be recovered by the township trustee, and all sums are for the benefit of the road district for which he was supervisor. Rev. Stat. 1894, § 6838.

It will be seen by an examination of these statutes that subsequent legislation has somewhat enlarged the powers and duties of township trustees and road supervisors in regard to bridges, and thus to some extent removed the reasons upon which the case of *House* v. *Montgomery County Comrs.*, and the cases following it were predicated. *Carroll County Comrs.* v. *Bailey*, 122 Ind., on pages 49, 50. In the case last cited, Mitchell, J., speaking for the court, said: "The duty of erecting and repairing bridges over watercourses is imposed upon the board of commissioners, while the general duty of keeping highways and bridges in repair is laid upon township trustees and road supervisors." It is a principle established by all the authorities that, where a person or corporation is free from fault, there is no liability for the negligence of a person not voluntarily chosen by such person or corporation to perform an act. *Dooley* v. *Sullivan*, 112 Ind. 451, 454, 455; *Abbett* v. *Johnson County Comrs.* 114 Ind. 65. It is clear, however, from a consideration of all the statutes concerning the powers and duties of boards of commissioners and other officers, and especially those in re-

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to keep open a ditch constructed under that section, as the cost of the ditch was to be apportioned from adjoining owners and was not payable out of the general fund of the county. It was further held that the rule that has been held to apply to bridges would not be applied to ditches, as there was a clear distinction between the two. It was said that inasmuch as the ditch had been adjudged to be a nuisance, and the county ordered to abate the same by repairing or reconstructing, the plaintiff had the remedy to compel the levy of a tax for the purpose of having the ditch put in proper condition. Dashner v. Mills County, 88 Iowa, 401.

And where overflow of a public ditch injured an adjoining crop a county was not liable. The distinction was made as to the liability for negligence in the maintenance of county bridges, holding that the ditch was made for the benefit of abutting owners. Green v. Harrison County, 61 Iowa, 311; and in Nutt v. Mills County, 61 Iowa, 754, the opinion in Green v. Harrison County was adopted as the law in a similar case.

In Fenton v. Salt Lake County, 3 Utah, 423, a right of action for injuries to land caused by the construction of canals and diverting a natural watercourse was denied, where the claim had not been presented and audited under the statute.

A county was not liable for taking out a small culvert in the highway and substituting an insufficient drain, thereby causing a nuisance and overflow on plaintiff's land. Packard v. Voltz, 94 Iowa, 277.

In that case it was said that the rule announced in Wilson v. Jefferson County, 13 Iowa, 181, in regard to liability for bridges, has been doubted, and it was held not applicable to a defective drain causing overflow. The reporter's syllabus says that the Wilson Case was overruled, but the opinion simply refuses to apply the doctrine of liability for defective bridges, which is well recognized in Iowa, although the principle in that case is doubted.

e. *By buildings.*

Counties are not liable for injuries caused to real property on account of the condition of its buildings. But a county was held liable for nuisances on a farm connected with its buildings, where the farm was not essential to the management of a public institution.

So, a county was not liable for an injury resulting from the negligence of the county in failing to keep in repair a privy owned and kept by the county for public use. Mobley v. Carter County, 5 Ky. L. Rep. 694.

And for injuries to a resident caused by reason of the erection of a county jail in that vicinity, by reason of the jail being kept in such a condition as to become a nuisance, under Neb. act February 27, 1873, making it the duty of the board of county commissioners of each county to erect a suitable jail and to keep the same in repair, the county was not liable, as in building the jail the county simply obeyed the command of the law-making power of the state in a matter of public concern, and for which it could not be held liable. The court held that the liability was a personal one of the jailor if the jail was a nuisance. Wehn v. Gage County Comrs. 5 Neb. 494, 25 Am. Rep. 497.

And a county was not liable for injuries caused to adjacent property by the filthy condition of the jail, under N. C. Code, § 707, subs. 5, authorizing the county board to make such orders respecting the corporate property of the county as may be deemed expedient, and the complaint nowhere alleged that the board failed to use the means at their disposal to prevent the accumulation of filth. Threadgill v. Anson County Comrs. 99 N. C. 352.

And for injuries caused to property in unlawfully, carelessly, and negligently changing and obstructing a stream so as to flood plaintiff's premises, while the county was building a jail, a recovery was denied. Downing v. Mason County, 87 Ky. 208.

An injunction was refused against the erection of a county jail in the proximity of plaintiff's property, although it was alleged that its erection would injure the property by reason of the emission of noxious vapors and gases. Burwell v. Vance County Comrs. 93 N. C. 73, 53 Am. Rep. 454.

But in Lefrois v. Monroe County, 48 N. Y. Supp. 519, it was held that where the sewage from a farm used in connection with county buildings flowed into a stream injuring a dairy farm belonging to plaintiff, an injunction was granted, and damages were awarded as compensation. The distinction

gard to bridges, that the same did not then, and do not now, give any support to the assumption in those cases that the board of commissioners had been given either the unconditional power to contract for the construction or repair of bridges, and appropriate the county funds to pay therefor, or provided with the means and instrumentalities necessary to cause or compel the same to be done. There is no provision in the statute which confers a right of action against the county for the negligent acts of the county or its board of commissioners in the management of the affairs of the county. No authority has ever been given the board of county commissioners to appropriate the county funds to pay damages in such cases, nor to levy and collect taxes for any such purposes. No fund has ever been provided, nor has any provision been made, for raising money, by taxation or otherwise, to pay such damages. *Cones* v. *Benton County Comrs.* 137 Ind., on page 408. The power to allow claims against the county, and pay judgments against the county, creates no liability, and gives no right of action to anyone. Such powers were given that the board of commissioners might pay just claims against the county, and not to create a liability in favor of anyone.

The principle asserted in *House* v. *Montgomery County Comrs.* 60 Ind. 580, 28 Am. Rep. 657, and the cases following it, in regard to the implied liability of counties, cannot be reconciled with those cases, in this and other states, which affirm the rule that a county is a subdivision of the state for governmental purposes, and is not liable for the negligence of its officers, unless a right of action is expressly granted by the statute. But it is earnestly contended by appellee that, if the rule of implied liability declared in the bridge cases was erroneous, the doctrine of *stare decisis* should be invoked to protect it, and the same should only be changed by legislation. While the rule of *stare decisis* is a salutary one, yet it is not to be applied in all cases. If a decision or series of decisions are clearly incorrect, either through a mistaken conception of the law, or though a misapplication of the law to the facts, and no injurious results would follow from their overthrow, and especially if they were injurious or unjust in their operation, it is the duty of the court to overrule such cases. 6 Alb. L. J. 329; *Church* v. *Brown*, 21 N. Y. 335. But if a principle of law, doubtful in its character or uncertain in the subject-matter of its application, has been set-

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was made between the obligations incurred in the management of an alms house or other public institutions and those which are involved in the ownership of a farm, although the latter may be an adjunct or accessory to the former. It was held that for a tort committed upon premises which the county had acquired for its mere convenience, advantage, or profit, and not because their possession was absolutely essential to the proper discharge of a public duty, it was liable to an adjoining owner of land whose premises were injured thereby. In this case it was said that a county in the management and care of its paupers and criminals was engaged in the performance of a public duty delegated to officers, and consequently for an injury which resulted from their lack of skill, or even from their negligence while actually engaged in the performance of their duty, no action will lie against the county which they represented. (The cases cited by the court to sustain the liability in this case were those of torts on premises controlled by cities. This case is now in the court of appeals.)

IV. *Other wrongful and negligent acts affecting persons or property.*

a. *Generally.*

Generally a county is not liable for injuries caused by torts or negligence of its officers, and a recovery was refused for wrongful attachment. But it was held liable for damages on an injunction bond, and was liable for extorting money by sale of a ferry license; but this latter case may be sustained upon the principle of money wrongfully received for plaintiff's use.

So, a county was not liable where it sold by mistake or wrongfully a tract of land for taxes to the plaintiff, and he brought suit to recover 30 per cent penalty, which money he would have been entitled to if the sale had been valid and the land had been redeemed, as Iowa Rev. Stat. § 785, providing that where by mistake or wrongful act of the treasurer land has been sold on which no taxes are due, the county is to hold the purchaser harmless, by paying him the amount of the principal, interest, and cost, did not authorize a judgment for the penalty. Coulter v. Mahaska County, 17 Iowa, 92.

In the absence of any statute a county was not liable for the tortious acts of its officers in levying an illegal tax and selling plaintiff's property, causing a cloud on his title. Pitkin County Comrs. v. Ball, 22 Colo. 125.

And a county was not liable for negligence of the board of supervisors in failing to issue railroad bonds. It was said that for the neglect or refusal to perform a duty imposed on him by law a supervisor was made personally liable under Cal. Pol. Code, § 4086. Santa Cruz R. Co. v. Santa Clara County, 62 Cal. 180.

So, where a county failed to sell bonds, or to issue warrants, as required by law, it was held that it was not liable on account of such neglect, although it was a case of money "withheld by a reasonable and vexatious delay," and Mont. Comp. Stat. § 1237, provides in such a case for paying 10 per cent, but it was held that a county could not be held liable for a violation or neglect of duties by its officers, and it would not be responsible for a breach of duty imposed upon commissioners, or for their nonfeasance or misfeasance in relation to such duty. Territory v. Cascade County Comrs. 8 Mont. 396.

In Montgomery County Comrs. v. Fullen, 111 Ind. 410, where the question was as to the right of a county to make a further assessment for a gravel road after the original assessment proved to be insufficient, and the board had failed to ascertain the cost in advance, under Ind. Rev. Stat. 1881, § 5095, providing that no bid shall be accepted which exceeds the estimated cost, it was said that the commissioners were not acting as agents of the county while exercising their powers, and it was impossible to conceive any valid reason why the county should sustain any loss because of their errors, negligence, or wrongs, and the county would not be liable for the failure of the commissioners to do their duty in the first instance, but the cost should be paid from the property.

And a county was not liable to a party furnishing material for a bridge where the county failed by reason of negligence to require a bond from the contractor, under Ind. act March 14, 1877, providing that no bid for building or repairing a bridge or building shall be received unless such bid shall be accompanied by a good and sufficient bond, which shall guarantee that the contractor

tled by a series of decisions, until it has become an established rule of property or the basis of contracts, it should not be overthrown except from the most urgent considerations of public policy. *Hines* v. *Driver*, 89 Ind. 339; *Grubbs* v. *State*, 24 Ind. 295; *Harrow* v. *Myers*, 29 Ind. 469; *Rockhill* v. *Nelson*, 24 Ind. 422, 424. To that extent only are courts ordinarily restrained from correcting mistakes which they may have made. It must not be understood, however, that a previous line of decisions affecting even property rights can in no case be overthrown. If the evil resulting from the principle so established is greater than the mischief to the community could possibly be from a disregard of former adjudications, they should be overruled, and a new rule declared. *Boon* v. *Bowers*, 30 Miss. 246, 64 Am. Dec. 159.

What was declared by this court on this question in *Paul* v. *Davis*, 100 Ind. 422, is applicable here. Elliott, J., speaking for the court, said: "A judicial decision does not make unalterable law, nor is it law in the sense that statutes are law. It was justly said by Senator Platt in *Yates* v. *Lansing*, 9 Johns. 415, 6 Am. Dec. 290, that 'the decisions of courts are not the law; they are only evidence of the law.' In another case it was said: 'I hope we shall consider what a decision really is, and treat it accordingly; not as the law, nor as giving the law, but simply as evidence of the law; and not conclusive evidence, but only prima facie evidence of what the law is.' *Henry* v. *Bank of Salina*, 5 Hill, 535. Chancellor Kent says: 'Even a series of decisions are not always conclusive evidence of what is law; and the revision of a decision very often resolves itself into a mere question of expediency, depending upon the consideration of the importance of certainty in the rule, and the extent of property to be affected by a change of it.' Again he says: 'It is probable that the records of many of the courts in this country are replete with hasty and crude decisions; and such cases ought to be examined without fear, and revised without reluctance, rather than to have the character of our law impaired, and the beauty and harmony of the system destroyed by the perpetuity of error.' 1 Kent. Com. 477. The lord chancellor of England said to the House of Lords: 'You are not bound by any rule of law which you could lay down, if, upon a subsequent occasion, you should find reason to differ from that rule; that is, like every court of justice, and I regard this as a court of

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shall promptly pay all debts incurred by him for labor and materials. Pike County Comrs. v. Norrington, 82 Ind. 190.

In Ilsley v. Essex County, 7 Gray, 465, which was an action for tort under Mass. Stat. 1855, chap. 95, providing a penalty against a county in case the county commissioners shall neglect to erect bounds at the termination or angles of a county road for the space of one month after being notified so to do, a notice to the chairman of the board was held not sufficient.

The surety of a school-land mortgage was not released by reason of injury caused by the county court in bidding in the property without authority and then putting it up after it had decreased in value and selling it at a second sale. It was held that a county would not be liable for the negligence or omission of those to whom she was compelled to confide the management of her pecuniary concerns. Ray County v. Bentley Common School Fund, 49 Mo. 236.

And a county was not liable for damages arising from wrongful attachment to property in an action brought by the county, as the officers in the suit were engaged in the performance of those public duties which were enjoined on them by the direct authority of the state, and not undertaken for the private benefit or emolument of the county. Reed v. Howell County, 125 Mo. 58.

But where the plaintiff had a ferry license, and the county unlawfully gave notice that it would grant the ferry franchise to anyone donating the largest amount of money, and the plaintiff was required to advance $500 to retain his privileges under his license and the commissioners had no discretion except an annual tax on the ferry not exceeding $100, the amount thus illegally extorted could be recovered with interest. It was also held that plaintiff was not *particeps criminis*. La Salle County v. Simmons, 10 Ill. 520.

And where a county was entitled, under Miss. Code, § 897, to all actions and remedies to which individuals are entitled, it was held that it could not escape liability for costs and damages which it had caused by the wrongful suing out of an injunction. Freeman v. Lee County Supers. 66 Miss. 1.

And in People, Burrows, v. Orange County Supers. 17 N. Y. 235, the supervisors of a county were compelled to levy a state tax where they had neglected and refused to levy the same, and claimed that N. Y. Laws, 1855, chap. 335, providing for such tax, was unconstitutional, under N. Y. Const. art. 7, § 13, providing that every law which imposes, continues, or revives a tax shall distinctly state the tax and the object, and it shall not be sufficient to refer to any other law to fix such tax. It was also held that the act was constitutional.

f. Affecting property.

Generally a county is not liable for injuries to property caused by wrongful acts of its agents, but there is a Michigan case which implies that a county would be liable where a county official returned to plaintiff a hog in a diseased condition, causing loss to his other stock.

So a county was not liable for damages for a horse killed from being overdriven while in the service of the county, as the judge of the superior court, or the sheriff, had no power to make the county responsible for the loss of a horse used by an officer. Dougherty County v. Kemp, 55 Ga. 252.

So, where injuries were caused to a horse by being overdriven by a sheriff who used the same in making an arrest, the county was not liable. Randles v. Waukesha County (Wis.) 71 N. W. 1034.

And where an employee of the county, who was working in repairing a road, occupied a barn of plaintiffs, and negligently destroyed the same by fire, no recovery could be had against the county. Field v. Albemarle County (Va.) 20 S. E. 954.

So, a county was not liable for damages where the agent of the poor farm in attempting to clear a portion of land, and in burning the brush, started a fire which ran onto other land, injuring other parties. It was held there was no liability in the absence of a statute imposing one. Symonds v. Clay County Supers. 71 Ill. 355.

A county was not liable generally for damages done to sheep by dogs, nor for neglect to levy a tax on dogs for the year 1893, where no such tax could be levied until an assessment of dogs should be made, as no special provision was made for assessments as a basis for levying taxes in and for the year 1893, under Pa. act May 25, 1893 (Pub. Laws, 136), providing for the taxation of dogs and protection of sheep. It was not shown that any money had been

justice; it is inherent in the nature of every court of justice that it should have liberty to correct any error into which it may have fallen.' *Bright* v. *Hutton*, 12 Eng. L. & Eq. (*vide* p. 15). In the case cited the earlier case of *Hutton* v. *Upfill*, 2 H. L. Cas. 674, was overruled, although it was a case growing out of the same subject-matter, and involving the same principle and substantially the same interests. The law is a science of principles, and this cannot be true if a departure from principle can be perpetuated by a persistence in error. If it be correct to affirm that there can be no departure from former decisions, then it would be true, as it has been well said, that 'in such cases *summum jus* might be *summa injuria*.' Ram, Legal Judgm. 201. The supreme court of California, in discussing this general subject, said: 'But it is a *solecism* to say that causes should be tried upon wrong principles,—be decided against the law whether it be for the purpose of justice or not, so to decide them. The law is not so false to itself as to require its own permanent overthrow, unless the subversion be necessary to the public interests; and whether it be so necessary in a given case or not is for the court to decide, as a matter of legal discretion, whenever the rule is invoked.' *Hart* v. *Burnett*, 15 Cal. 530 (*vide* opinion, 607). Consistency purchased by adherence to decisions at the sacrifice of sound principle is dearly bought. But we deem it unnecessary to further pursue this discussion, for we know quite well that there is not a court in England or America that has not corrected erroneous departures from the principles of justice by overthrowing previous decisions. . . . Much as we respect the principle of *stare decisis*, we cannot yield to it when to yield is to overthrow principle and do injustice. Reluctant as we are to depart from former decisions we cannot yield to them, if, in yielding, we perpetuate error and sacrifice principle. We have thought it wisest to overrule outright rather than to evade, as is often done, by an attempt to distinguish where distinction there is none. We have preferred the censure that sometimes falls upon us rather than undertake to distinguish, and thus make 'confusion worse confounded,' where there is no room to limit or distinguish."

The case of *House* v. *Montgomery County Comrs.* 60 Ind. 580, 28 Am. Rep. 657, and cases following, do not involve property rights, nor has the rule which they declare in any sense become a rule of property or a basis for con-

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paid into the county treasury as a part of the county stock under said act. But the county was liable for injury done to sheep in 1893, where it was shown that a fund was raised and collected in 1894, although the 2d section of the act implies that the damages are to be paid only out of the taxes of the current year, where the act provides that it "shall annually levy a tax upon each dog so returned, and within the discretion so given to such commissioners, etc., to such an amount as will in their judgment create a sufficient fund from which all loss or damage caused to sheep within the respective counties or cities, by a dog or dogs, during each current year, may be paid, together with all necessary expenses incurred in the adjustment of claims as hereinafter provided." Section 5 provides for the payment of damages out of the fund raised or to be raised, and this does not limit the right of payment for such damage only out of the fund of any current year. Morgan v. Tioga County, 17 Pa. Co. Ct. 246.

But where the plaintiff sued the superintendents of the poor of the county, and charged that by reason of their negligence a boar of the plaintiff became diseased and was returned to plaintiff in that condition, whereby other stock was injured, and the defendants objected to the introduction of any evidence, first, because an action against the superintendents of the poor in their name of office was in reality against the county, which was a quasi corporation: second, because the superintendents of the poor were in no sense agents of the county; and, third, because the superintendents of the poor were a quasi corporation for the benefit of the general public, and could not be liable because the declaration did not allege that the defendants were operating a county poorhouse in pursuance of their corporate duties, and did not state any facts which showed them liable in a corporate capacity or made the county liable for their acts or negligence,—it was held that the court erred in excluding the evidence offered, and the case was reversed for a new trial. Rowland v. Kalamazoo County Supers. of Poor, 49 Mich. 553.

A complaint alleging a trespass by the county in tearing down a wall and removing a vault was held defective in failing to show that plaintiff had complied with the statute in regard to presenting claims to the county board. Rhoda v. Alameda County, 52 Cal. 350.

But in Rhoda v. Alameda County, 69 Cal. 523, an amended complaint showing a compliance with the statute by the proper presentation of the claim to the commissioners of the county board stated a cause of action.

V. *Infringement of patents.*

The weight of authority is that a county is liable for infringement of a patent, but there are two cases to the contrary whose authority has been denied. Some cases require the claim to be presented to the county board for auditing before suit could be brought.

A county in Kentucky was held liable for an infringement of a prison device, as counties in that state are corporations and can contract and sue and be sued, and Ky. Gen. Stat. chap. 28, art. 16, provides that county courts may erect and keep in repair county buildings, while art. 17 provides that the county court shall cause to be erected and keep in repair a good and sufficient jail. May v. Mercer County, 30 Fed. Rep. 246.

In May v. Mercer County, 30 Fed. Rep. 246, for the infringement of a patent in the use of an improvement in the construction of a county jail, a recovery was allowed under U. S. Rev. Stat. § 4919, by an action on the case, and the complaint, whether called a declaration or a petition under the Code, containing all the allegations material to make an action on the case, would be sufficient.

In that case it was said that the reasoning in the case of Lawrence County v. Chattaroi R. Co. 81 Ky. 225, to the extent that public buildings belong to the county as a corporation, and the county may sue for an injury done to them in an action on the case, implied that counties were liable for property taken and used in the erection of public buildings, even though the property was wrongfully taken.

So, a county was liable for an infringement of a patent under U. S. Rev. Stat. § 4919, providing that damages for the infringement of any patent may be recovered by an action on the case in the name of the party interested, and a county is liable although it is only a quasi-municipal corporation and cannot be exempted by the state-

tracts. The overruling of those cases will not produce uncertainty in titles, or introduce doubt and confusion in questions of property or contracts. Under such circumstances, it is the duty of the court to correct its own errors, and the doctrine of *stare decisis* cannot be successfully invoked to perpetuate them. *Paul* v. *Davis*, 100 Ind. 422; *Rockhill* v. *Nelson*, 24 Ind. 422, 424; *Hines* v. *Driver*, 89 Ind. 339; *Linn* v. *Minor*, 4 Nev. 462; *McDowell* v. *Oyer*, 21 Pa. 423. This case is within the principle established in *Hines* v. *Driver*, 89 Ind. 339, and *Paul* v. *Davis*, 100 Ind. 422.

It is urged by appellee that, by holding the county liable in such cases as this, the boards of commissioners will be convinced that it is cheaper to keep the bridges in repair than to pay damages for injuries. The enforcement of the penal statutes, and the creation of personal liability, if it does not now exist, for injuries caused by neglect of official duty, would probably be more convincing to the officer than taking the public funds to pay such damages. While the doctrine declared in the bridge cases might be properly overruled on other grounds stated in this opinion, we prefer to base our action on the broad ground that counties, being subdivisions of the state, are instrumentalities of government, and exercise authority given by the state, and are no more liable for the acts or omissions of their officers than the state. The case of *House* v. *Montgomery County Comrs.* 60 Ind. 580, 28 Am. Rep. 657, and the cases following it, so far as they declare the doctrine of implied liability of counties for negligence of their officers in erecting or keeping bridges in repair, are overruled.

It follows that the court erred in overruling the demurrer to the complaint and the motion in arrest of judgment. There are other reversible errors in the record, but it is not necessary to consider them.

Judgment reversed, with instructions to sustain the demurrer to the complaint, and for further proceedings not in conflict with this opinion.

All concur.

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from liability for infringement of letters patent. May v. Ralls County, 31 Fed. Rep. 473.

In May v. Johnson County, Fed. Cas. No. 9, 334, a county was held liable for an infringement of a patent in the construction of a jail. The liabilities of counties as such were not discussed, and do not seem to have been questioned, the court saying, however, that "if the subject-matter of a patent possesses the requisities of novelty and utility it is protected against the encroachments of society, and no one has the right to use it without paying for it."

And in May v. Fond du Lac County, 27 Fed. Rep. 695, a county was held liable for an infringement of a patent in the construction of a prison. No question seems to have been made as to the county's liability, but the question was as to the infringement, novelty, etc.

In May v. Logan County Comrs. 30 Fed. Rep. 250, and May v. Saginaw County, 32 Fed. Rep. 629, it was held that an assignment after an infringement of all right, title, interests, claims, and demands under a patent made by an administrator or patentee, approved by a court of competent jurisdiction, authorized a suit against the county by the assignee, for an infringement of the patent, denying May v. Juneau County, 30 Fed. Rep. 241, on the ground that the cases on which this decision was made do not sustain the doctrine deduced.

In May v. Logan County Comrs. 30 Fed. Rep. 250, Jacobs v. Hamilton County Comrs. 1 Bond, 500, was disapproved, and it was held that the state could not exempt counties from liability for an infringement of patents, nor has it attempted to do so, as the patentee's rights are defined by Congress, which has exclusive control.

In May v. Saginaw County, 32 Fed. Rep. 629, the cases of May v. Buchanan County, 29 Fed. Rep. 469, and May v. Cass County, 30 Fed. Rep. 763, were distinguished on the point that the remedy was by demand of the board of supervisors, under Michigan Constitution providing that exclusive power is vested in the board of supervisors to adjust all claims against their respective counties, and the sum so fixed shall be subject to no appeal, as this did not apply to torts and as the statutes in those cases were different.

But in May v. Buchanan County, 29 Fed. Rep. 469, it was held that Iowa Code, § 2610, providing presentation of claim to the board of supervisors before bringing an action, applied to a suit for infringement of a patent by a county, and a petition for an infringement should show such action. It was said that if the Iowa laws did not confer on the county the right to sue and be sued, the plaintiff would be without remedy.

So, in holding that a county was liable for the infringement of a patent in the use of an improvement in the construction of prisons, it was also held that the Iowa Code, § 2610, providing that before suit is brought upon an unliquidated claim the same must be presented to and demand for payment be made of the board of supervisors, should be enforced in United States courts, and a recovery could not be had where such claim was not so presented and acted on. May v. Jackson County, 35 Fed. Rep. 710; May v. Cass County, 30 Fed. Rep. 762.

But in May v. County of Juneau, 30 Fed. Rep. 241, it was held that a county was not liable for the infringement of a patent where its officers had no knowledge of any infringement, and the actual use did not occur until after the expiration of the patent. It was further held that the assignment in this case did not authorize a recovery for past infringements. It was said that the county would not be liable in any case, following Jacobs v. Hamilton County Comrs. 1 Bond, 500. But see May v. Logan County Comrs. 30 Fed. Rep. 250.

And in Jacobs v. Hamilton County Comrs. 1 Bond, 500, a county was not held liable in damages for infringement of a patent in the construction of a county prison. It was said that the contractor would be liable. But see May v. Logan County Comrs. 30 Fed. Rep. 250.

VI. *Damages by defaulting officer.*

It is generally held that a county is not liable for damages caused by a defaulting officer where the county has not received the benefit of the money or it has not been paid into the county treasury; but a county was held liable for money collected by its attorney authorized to collect taxes, and also in some cases arising under particular statutes.

So, a county was not liable for the tortious act of its treasurer in collecting excessive taxes from the plaintiff, and appropriating them to his own use. Estep v. Keokuk County, 18 Iowa, 199.

A county was not liable to a city for money collected and embezzled by the county treasurer where he acted as agent of the city in collecting such money. The court said that "it is intimated, but not proved, that he applied the moneys to county purposes, but it was conceded that he never

MINNESOTA SUPREME COURT.

Peter SCHUSSLER, *Respt.*,
v.
HENNEPIN COUNTY COMMISSIONERS,
Appts.

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

***As a general rule, a municipal corporation is not responsible** for the unauthorized and unlawful act of its officers, though done *colore officii*; but when such corporation itself expressly authorizes such act, or when done, adopts and ratifies it, and retains and enjoys its benefits, it is liable in damages.

(February 9, 1897.)

APPEAL by defendants from a judgment of the District Court for Hennepin County in favor of plaintiff in an action brought to recover damages for alleged wrongful interference with plaintiff's riparian rights. *Affirmed.*

The facts are stated in the opinion.

Mr. **A. H. Nunn,** for appellants:

Lake Minnetonka is a navigable body of water. It is wholly within the state, and the state has exclusive sovereignty over it.

Those buying upon that lake buy subject to the superior rights of the sovereign to absolutely and at its pleasure control the waters within natural high-water mark, regardless of the effect it may have upon riparian owners.

Morrill v. *St. Anthony Falls Water Power Co.* 26 Minn. 222, 37 Am. Rep. 399; *State* v. *Minneapolis Mill Co.* 26 Minn. 231; *Page* v. *Mille Lacs Lumber Co.* 53 Minn. 500; *Lamprey* v. *State*, 52 Minn. 198, 18 L. R. A. 671; *Falls Mfg. Co.* v. *Oconto River Improv. Co.* 87 Wis. 134, *Wisconsin River Improv. Co.* v. *Manson*, 43 Wis. 255, 28 Am. Rep. 542; *People, Loomis*, v. *Canal Appraisers*, 33 N. Y. 461; *Com.* v. *Boston & M. R. Co.* 3 Cush. 53; *Treat* v. *Lord*,

*Headnote by BUCK, J.

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accounted to the county, and was a defaulter for a large amount." Under Mich. Pub. Acts 1875, chap. 278, § 13, providing that all moneys collected by any treasurer under the liquor tax act except his fees shall be placed by him to the credit of the contingent fund of the township, village, or city from which the same was collected, the county treasurer was the agent of the municipalities, and not of the county. Marquette County v. Dillon, 49 Mich. 244.

When the owner paid, as he supposed, redemption money for his land to the treasurer, but the purchaser had repudiated the purchase, it was held that the nominal redemption to the extent of the amount due for taxes and penalty was in effect but a mere payment, and beyond this it was an unauthorized exaction, and was no claim against the county but against the treasurer. State, Myers, v. Richardson County Comrs. 11 Neb. 403.

And a county was not held liable for money paid to a county treasurer for redemption, where it was not shown that such money was paid into the treasury, as under Neb. Gen. Stat. 922, § 66, the moneys are to be paid to the purchaser, his agent, or attorney, and no warrant of the county commissioner is necessary for its repayment where it was not paid into the county treasury. In this case the petition failed to show that any part of the money had ever been paid into the county treasury. Richardson County v. Meyer, 11 Neb. 357.

So, a county was not liable for money collected by a county treasurer for a redemption of land sold for taxes, under Neb. Rev. Stat. p. 329 (Revenue Law 1866, § 68) providing that on the redemption by an owner or occupant by payment to the county treasurer, he shall give receipt therefor to the person redeeming the same and file a duplicate with the county clerk, and hold the money paid subject to the order of the purchaser, his agent or attorney, where it was not shown that the money was paid into the county treasury. Eaton v. Cass County Comrs. 11 Neb. 229. In this case the plaintiff claimed that he was ignorant for several years that the money had been paid, and there evidently had been a change in the county treasurers.

And the sureties of a sheriff could not defend their bond in an action for a balance due from the sheriff by showing that after the balance was ascertained the county commissioners had given the sheriff checks to an amount exceeding the balance, as the public is not chargeable with the negligence of its officers in such cases, even as against sureties. Com. v. Brice, 22 Pa. 211, 60 Am. Dec. 79.

A county was not liable where a judgment had been obtained against the sheriff in the name of the people for money belonging to the state which the county treasurer had received and neglected to pay over, and the treasurer gave a note to a bank and paid the proceeds over to the state. It was not shown that the county treasurer was in any manner authorized to borrow the money, and his contract for its repayment could not be binding upon the county. First Nat. Bank v. Saratoga County Supers. 106 N. Y. 488.

In Cedar Rapids, I. F. & N. W. R. Co. v. Cowan, 77 Iowa, 535, which was an action on the treasurer's bonds for money belonging to a railroad company appropriated by him to his own use, it was said that the county was not liable for such money.

But in Conway County v. Little Rock & Ft. S. R Co. 39 Ark. 50, it was held that a county was bound by a payment made to an attorney employed by the county to collect taxes, where such attorney collected the same and never accounted to the county for the money. This liability was applied on the ground that a collection by an attorney who obtained the judgment was binding, and the further ground that where "one of two innocent parties must suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain it."

And under Ind. Stat. 1 Gavin & H. 113, providing that a county shall be liable for all losses to the state sustained by the default of the county treasurer, and such losses shall be added to the next year's taxes of such county, a county was required to add to the tax list an amount lost through the defalcation of a county treasurer. State, McCarty, v. Montgomery County Comrs. 26 Ind. 523.

Under Pa. act April 29, 1844, providing that the several counties of a state are liable for the state taxes assessed upon the property within them respectively, a county was held liable to the state where the county treasurer had defaulted. It was held that it was no defense that the bond taken from the county treasurer was approved by the court of quarter sessions where the same was insufficient, as the state would not be prejudiced by the neglect of the agents of the state, even if the judges in taking the bond acted as state agents, as full power was given to the county commissioners to enforce the giving adequate security. Schuylkill County v. Com. 36 Pa. 524.

VII. *By misapplication, conversion, or taking property.*

It is generally held that counties are liable where

42 Me. 552, 66 Am. Dec. 298; *Fletcher* v. *Phelps*, 28 Vt. 257; Gould, Waters, § 56; *South Carolina* v. *Georgia*, 93 U. S. 9, 23 L. ed. 783.

The county is not liable in damages on account of the acts of its officers.

Dosdall v. *Olmsted County*, 30 Minn. 96, 44 Am. Rep. 185; *Snider* v. *St. Paul*, 51 Minn. 466, 18 L. R. A. 151; *Gullikson* v. *McDonald*, 62 Minn. 278; *Altnow* v. *Sibley*, 30 Minn. 186, 44 Am. Rep. 191.

The complaint failed to allege that the act was authorized by law, and the court expressly finds that the construction and maintenance of the dam were without authority. The county, therefore, is not liable for this act of its officers.

Kreger v. *Bismarck Twp.* 59 Minn. 3; *Weltsch* v. *Stark*, 65 Minn. 5; *Pitkin County Comrs.* v. *Ball*, 22 Colo. 125; *Johnson County Comrs.* v. *Hemphill*, 14 Ind. App. 219; *Crandon* v. *Forest County*, 91 Wis. 239.

There is no contention that the act of 1891, under which the commissioners of Hennepin county constructed and maintained the dam, conferred any authority or power upon the board. The act was unconstitutional.

The acts of the commissioners of Hennepin county done *colore officii* under this unconstitutional law were *ultra vires* and did not bind the county or render it liable in damages to anyone thereby injured. It is not different from any *ultra vires* act of a public board or officer.

Albany v. *Cunliff*, 2 N. Y. 165; *Browning* v. *Ozen County Comrs.* 44 Ind. 11; *Rowland* v. *Gallatin*, 75 Mo. 134, 42 Am. Rep. 395; *Spaulding* v. *Lowell*, 23 Pick. 71; *Schumacher* v. *St. Louis*, 3 Mo. App. 297; *Cuyler* v. *Rochester*, 12 Wend. 165; *Anthony* v. *Adams*, 1 Met. 284; 2 Dill. Mun. Corp. §§ 766-768; *Haag* v. *Vanderburgh County Comrs.* 60 Ind. 514, 28 Am. Rep. 654; *Seele* v. *Deering*, 79 Me. 343; *Morrison* v. *Lawrence*, 98 Mass. 219; *Cushing* v. *Bedford*, 125 Mass. 526; *Lemon* v. *Newton*, 134 Mass. 476.

Messrs. **Young & Fish,** for respondent:

There is a distinction firmly fixed by the decisions, but not well founded in reason, be-

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they are benefited by misappropriation of money or property, as in an action of assumpsit for money had and received or for conversion. There seems to be an exceptional case in North Carolina, but in that case it was held that the treasurer was also the treasurer of plaintiff, and that he should have refused to honor the warrants of the county against the fund.

So, where a county treasurer misappropriated taxes assessed on a railroad corporation, and applied the same to the payment of county and state taxes instead of to the payment or redemption of bonds of a town, the county was liable in an action as for money had and received for the money so misappropriated. Strough v. Jefferson County Supers. 119 N. Y. 212.

And where the county unlawfully appropriated moneys collected from a town to its own use, it was required to refund them to the town in an action for money had and received. Bridges v. Sullivan County Supers. 92 N. Y. 570.

And under the Indiana Constitution, requiring counties to bear the expense of protecting, investing, and collecting the school funds, an action could be maintained against a county by the state for moneys paid out to its officers for managing the school fund. It was held the statute of limitations was not in defense, as it was for a trust fund. Rush County Comrs. v. State, Hord, 103 Ind. 497.

And a county was liable for township taxes received by the county treasurer and not paid to the township by the treasurer. It was held that the omission of the county to charge these taxes in the account with the treasurer did not release the county. Potter County v. Oswayo Twp. 47 Pa. 162, citing Lycoming County v. Huling, MSS.

Under N. Y. Laws 1874, chap. 63, § 1, amended by Laws 1892, chap. 60, § 3, providing that excise moneys received for license issued to the residents of a village shall be paid over to its treasurer to be used for the expenses of the village, a county was held liable to a town for such funds collected by the county treasurer and misappropriated by him to other county purposes. Port Richmond v. Richmond County, 11 App. Div. 217.

So, under N. Y. Laws 1869, chap. 907, § 4, amended by Laws 1871, chap. 283, providing that certain taxes assessed against a railroad in a town shall be paid to the treasurer of the county and used by him to purchase bonds, issued by the town in aid of the railroad, a county was liable to a town for moneys so collected by the treasurer and misappropriated by him to other county purposes. Kilbourne v. Sullivan County Supers. 137 N. Y. 170; Vinton v. Cattaraugus County Supers. 89 Hun, 582; Crowninshield v. Cayuga County Supers. 124 N. Y. 583.

But the county was entitled to credit for any moneys paid to the railroad commissioners of the town during that time. Vinton v. Cattaraugus County Supers. 89 Hun, 582.

Where a special assessment for a gravel road was enjoined, the holders of bonds issued to pay for the road, who were not parties to the injunction suit, could maintain an action against a county for money received from the sale of bonds misappropriated to the use of the county. It was said that a county could not be made accountable for any loss resulting from the error or neglect of its officers; but this case was only to recover money which was alleged to have gone into the general fund of the county, and it should be applied to the payment of the bonds. Spidell v. Johnson, 128 Ind. 235.

A petition alleging that the county treasurer had wrongfully taken possession of money belonging to an insane person, and placed the same in the county treasury, that the county wrongfully accepted and received said money and converted the same to its own use, and still retained the same, stated a cause of action. It was further held that the county was liable for taxes illegally assessed, which were claimed in another paragraph of the complaint. Hennel v. Vandeburgh County Comrs. 132 Ind. 32.

Where an action was brought for taking dirt from plaintiff's land, and the plaintiff told the superintendent that if the dirt was taken he would claim pay for it from the county, and it was contended that an action could not be maintained as this was a tort, it was held that the tort could be waived and suit would lie as upon contract. It was further held that if the officers of the county committed a trespass whereby the county received certain benefits the county would be liable on an implied contract for the value of the dirt; and further, that a contract to donate and perform all labor was not an agreement to donate the dirt and would not prevent a recovery, but if it was the county could not go upon plaintiff's land against his will and take his dirt. Rush County Comrs. v. Trees, 12 Ind. App. 479.

But in Bladen County Bd. of Edu. v. Bladen Comrs. 113 N. C. 379, where the county commissioners misapplied a fund belonging to the board of

ween municipal corporations proper and quasi-municipal bodies, such as towns, counties, school districts, etc., in respect to their liability for damages for mere negligence. The former are held liable, the latter are not.

Altnow v. *Sibley*, 30 Minn. 186, 44 Am. Rep. 191.

There is nothing in the decisions of this court necessarily committing it to any extension of this untenable distinction to wrongs other than negligence. Indeed, the tendency is the other way.

Peters v. *Fergus Falls*, 35 Minn. 549; *Weltsch* v. *Stark*, 65 Minn. 5; *Woodruff* v. *Glendale*, 23 Minn. 537; *Thompson* v. *Polk County*, 38 Minn. 130; *Gould* v. *Sub-District No. 3*, 7 Minn. 203.

Towns and counties are liable for the improper exercise of powers which are within the general scope of their duties, but not for mere negligence or failure to perform the duties imposed by law.

Altnow v. *Sibley*, 30 Minn. 186, 44 Am. Rep. 191; *Snider* v. *St. Paul*, 51 Minn. 466, 18 L. R. A. 151.

It has not been decided in this state that a town or county is not liable for damages arising from a trespass or other active wrong done by its official board *colore officii*.

Gould v. *Sub-District No. 3*, 7 Minn. 203, cited in *Bank* v. *Brainerd School Dist.* 49 Minn. 106; *Dosdall* v. *Olmsted County*, 30 Minn. 96, 44 Am. Rep. 185.

In this case the county answers and avers that it has built and maintained the dam lawfully. The defense failing, it is certainly proper that the mischief which has been committed should be undone and its further commission restrained.

The county does not plead *ultra vires* as it might do if sued on an authorized contract. It ratifies and confirms the *ultra vires* acts of its official board and so becomes itself the aggressor.

Salt Lake City v. *Hollister*, 118 U. S. 256, 30 L. ed. 176; *Thayer* v. *Boston*, 19 Pick. 511, 31 Am. Dec. 157.

The dam in question is a nuisance, and no sort of a municipal or public corporation has a right to maintain it.

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education by directing the disbursements under a mistake of the law, it was held that the county was not liable, as it would follow that the courts would be required to enforce a levy of a sufficient tax upon the property of the county to replace the amount belonging to the school fund, which had already been wrongfully but honestly expended for the support of the poor. It was further held that all the money collected for educational purposes should have been paid over by the sheriff to the county treasurer in his capacity as treasurer of the board of education, and held by him subject to the orders of the board, and he should not have paid out the fund on the order of a county commissioner; and it was held that the treasurer was the one who made the misapplication. It was said that a recovery could not be had even against him.

VIII. *Presentation of claims before county board as a condition precedent to suit.*

There is some conflict as to whether it is requisite that a claim for tort or negligence shall be presented to the county board for auditing before a suit can be maintained for damages, some cases holding that it is absolutely essential, and others holding the contrary, and that it would be improper to allow the county officials to pass on matters involving their own actions.

An action could not be maintained against a county for injuries from the falling of a public bridge, where the claim had not been presented to the county board for allowance, under Ala. Code 1876, § 2903, providing that suit must not be brought against a county until the claim has been presented to the court of county commissioners and disallowed or reduced, and § 827, requiring claims to be itemized and sworn to, and § 832, providing that claims not presented within twelve months after they accrue are barred. Schroeder v. Colbert County, 66 Ala. 137.

So, a county was not liable for damages from a defective bridge where the claim had not been presented to the county commissioners and disallowed under Ala. Code 1876, § 2903, providing for presentation of claims and demands to the commissioners' court. Such claim should be itemized and sworn to under § 827, prohibiting the commissioners from allowing any claims not itemized or sworn to. Schroeder v. Colbert County, 66 Ala. 137.

And a county was not liable for the falling in of a bridge where there was no evidence that the plaintiff ever presented his claim to the court of county commissioners to be passed upon or allowed by Ala. Code 1886, § 902, requiring presentation of claims. Roberts v. Cleburne County (Ala.) 22 So. 545.

And Ala. Code, §§ 775, 2141, providing that no action can be brought against the county until the claim or demand has been presented within twelve months after it accrues or becomes payable, applies to suits for damages for injuries from defective bridges under a statutory liability. Barbour County v. Horn, 41 Ala. 114.

And under Iowa Code, § 2610, providing that no action shall be brought against any county on an unliquidated demand until the same has been presented to the board of supervisors and payment demanded, where a claim had been presented to the county of $500 damages for injuries received on account of a defective bridge, and an action was brought for that amount and increased by an amendment, no recovery could be had for a greater amount than that presented to the board of supervisors. Marsh v. Benton County, 75 Iowa, 469.

Under Iowa Code, § 2610, it was sufficient if the board was informed of the amount of the claim and the grounds on which it was made, sufficiently to enable it to understand the claim. Dale v. Webster County, 76 Iowa, 379.

And under Iowa Code, § 2610, the plaintiff was not required to produce his evidence in making his claim before the county board, but it was sufficient if his claim was presented with sufficient clearness to enable it to investigate the facts. Homan v. Franklin County, 98 Iowa, 692.

And damages for future loss, pain, and suffering were properly allowed where the claim presented to the board stated that the plaintiff was seriously and permanently injured, and the petition was for permanent disability. Homan v. Franklin County, 98 Iowa, 692.

Where the petition alleged that the claim was duly verified and presented to the county board, it was held that under the general issue it was for the court to determine whether plaintiff had the right to bring an action, and it was not necessary to submit this to the jury. The presentation of the claim for injuries from a bridge to the county board was held to be a "demand," and that some of the injuries in the trial were a little greater than those in the statement was immaterial. Homan v. Franklin

1 Dill. Mun. Corp. § 374, note; *Petersburg* v. *Applegarth*, 28 Gratt. 321, 26 Am. Rep. 357; *Brayton* v. *Fall River*, 113 Mass. 218, 18 Am. Rep. 470; *Harper* v. *Milwaukee*, 30 Wis. 365; *Franklin Wharf Co.* v. *Portland*, 67 Me. 46, 24 Am. Rep. 1; *Hannibal* v. *Richards*, 82 Mo. 330; Wood, Nuisances, § 742.

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

The board of county commissioners of Hennepin county in the year 1893 erected a dam across Minnehaha creek, the natural outlet of Lake Minnetonka, and about 3½ miles below said lake, under the supposed authority of Special Laws 1891, chap. 381, for the purpose of raising and maintaining a uniform height of water in the lake, in aid of navigation. The plaintiff at the time of the erection of the dam, and for many years prior thereto, owned a piece of land about 3½ miles below this dam, upon which he had erected and used a grist-mill operated by the water of this stream; and, to this end, plaintiff had provided the necessary wheels, pond flumes, and raceway power, and, until interfered with by the defendant's erection of the dam, he was enabled to store and use the waters of this stream, by means of said pond and other facilities possessed by him, and whereby said mill was propelled and operated for his use and profit. The defendant erected said dam about 5 feet in height, and, ever since its erection, has maintained the same, whereby said stream has been obstructed and held back except at times when the stage of water in Lake Minnetonka is sufficiently high to flow over said dam. The dam so erected and maintained is 5 inches above the natural bed of the stream, and the sole purpose of defendant in erecting the dam and obstructing the natural flow of the stream was to hold back and retain the water in Lake Minnetonka for the purpose of increasing the volume of water therein, and maintaining a uniform quantity and stage of water in aid of navigation, the lake being an inland, navigable one. The action is one to recover damages alleged to have been sustained by plaintiff by reason of the construction and maintenance of said dam, and for an injunction restraining and

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County, 98 Iowa, 692. See former appeal, 90 Iowa, 185.

Under Iowa Code, § 2610, providing for presentation of claims to the board of supervisors before bringing an action, a suit for an infringement of a patent was within the provisions of such section, and a demand was held to be a necessary condition precedent. May v. Buchanan County, 29 Fed. Rep. 469; May v. Jackson County, 35 Fed. Rep. 710; May v. Cass County, 30 Fed. Rep. 762.

And under Utah Sess. Laws 1878, p. 4, providing that no action shall be commenced against any county until the claim, demand, or right of action shall be disallowed, an action for injuries to land by constructing canals near the same and diverting a natural watercourse, and for equitable relief, was dismissed because it was not shown that the statute was complied with. Fenton v. Salt Lake County, 3 Utah, 423, 4 Utah, 466.

And under Cal. act March 20, 1855, § 24, providing that no person shall sue a county in any cause for any demand unless he shall first present his claim to the board of supervisors for allowance and the same shall be rejected, an action would not lie for extending a street through the land of plaintiff without providing any compensation unless the claim had been presented for auditing. McCann v. Sierra County, 7 Cal. 121.

And under Cal. Pol. Code, 4072, prohibiting the board of supervisors from allowing an account unless properly made out, itemized, and verified, where an action was brought against a county for tearing down an inner wall of plaintiff's building and severing from the same a permanent fixture, to wit, a metallic vault, the complaint was held defective in not alleging the manner in which plaintiff complied with this section of the Code. Rhoda v. Alameda County, 52 Cal. 350.

But in Rhoda v. Alameda County, 69 Cal. 523, an amended complaint showing a compliance with the statute by the presentation to the board of county commissioners stated a cause of action.

And Ind. act March 9, 1885 (Elliott's Supp. § 1948), providing that on the rejection of a claim by the board of county commissioners the plaintiff may apply or at his option bring an action against the county, applies to claims sounding in tort. Allen County Comrs. v. Creviston, 133 Ind. 39.

In Posey County Comrs. v. Stock, 11 Ind. App. 167, it was held that under Ind. Rev. Stat. 1894, § 7858, providing for an appeal on disallowance of a claim by the board of commissioners, the claimant might maintain an independent action without taking the appeal, but the complaint to recover for injuries caused by a defective bridge should show that the county had notice, prior to the time of the accident, that the bridge was unsafe.

In Jackson County Comrs. v. Nichols, 139 Ind. 611, which was an action for personal injuries sustained by a defective bridge, it was held that it was not necessary to prove that the plaintiff had filed a claim with the county board before he had filed the complaint in this case.

And it was not necessary for the plaintiff in an action for injuries from a bridge to show that his claim had been disallowed before bringing his action. Sullivan County Comrs. v. Arnett, 116 Ind. 438.

In Hancock County Comrs. v. Leggett, 115 Ind. 544, where the plaintiff stated that he had filed his claim before the board, and they had disallowed the same, and it was contended that his bill of complaint was insufficient, it was held that it was for the defendant to show whether or not the claim had been properly presented under Ind. Rev. Stat. 1881, §§ 5758–5769, providing that no court shall have jurisdiction of any claim against a county unless the claimant shall file his claim with the board of commissioners and have the same disallowed.

In Fulton County Comrs. v. Maxwell, 101 Ind. 268, where the county was sued for injuries caused by a defective public bridge on the highway, it was held that Ind. Rev. Stat. 1881, § 5769 (Acts 1879, p. 106), providing for filing claims against counties and presenting the same to the board of county commissioners, and § 5760, providing that no court shall have jurisdiction of any claim against any county except as provided in this act, repeal Rev. Stat. 1881, § 5771 (act of 1852), providing for bringing an original action on disallowance of claim, instead of appealing.

After this case was reversed, and on the 27th of March, 1886, plaintiff began another action, and it was held that Ind. Acts 1885, p. 80, providing that if a claim is disallowed the party may appeal or bring an action, was not retrospective, and the only remedy for this plaintiff was to appeal from a disallowance of his claim by the commission. Maxwell v. Fulton County Comrs. 119 Ind. 20.

But in May v. Saginaw County, 32 Fed. Rep. 629, it was held that the Nebraska Constitution providing that exclusive power is vested in the board of

enjoining the defendant from maintaining the same so as to interrupt the natural flow of the water in the stream mentioned. The trial court, among its other findings of fact, also found "that the plaintiff, by reason of the construction and maintenance of the dam as above stated by the defendant, and the consequent obstruction of and interference with the natural and customary flow of the waters of said Minnehaha creek, has been deprived of the natural use of said waters, and is thereby subject to hindrance and great inconvenience in and about the operation of his said mill, to his damage in the sum of $500. And as conclusions of law: (1) That the plaintiff is entitled to judgment herein for the abatement of said dam so erected and maintained by the defendant board, so far as said dam obstructs the natural flow of said stream. (2) For a perpetual injunction ordering and requiring defendant to lower said dam 5 inches from the top thereof, and for such a width as was the natural width of the original bed of said stream. (3) For the recovery of $500 as damages, and for the costs and disbursements in this action."

While the plaintiff had no property interest in the water itself, he had an interest in it as it passed along through his land as it was wont to run, and a wrongful and unlawful interference so as to materially interrupt or diminish the natural flow of the stream to plaintiff's damage would constitute a cause of action. The county attorney, representing the defendant, conceded that the acts of the board were unlawful, and that the Special Laws of 1891 (chap. 381) relating to the improvement of the navigation of Lake Minnetonka, and establishing and maintaining a uniform height of water in said lake, under which they assumed to act, was unconstitutional, and insisted that such acts were *ultra vires*, and hence no action against the county could be maintained. Upon this concession of appellant's attorney, and certain allegations in the answer, the question to be determined is the liability of the defendant.

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supervisors to adjust all claims against their respective counties, and the sum so fixed and defined shall be subject to no appeal, did not prevent an action against a county for infringement of a patent, as this provision had no application to claims for torts.

It was held that under Neb. Comp. Stat. 1889, chap. 18, § 37, providing for presentation of claims to the county, this claim was not required to be presented, as unliquidated demands from a tort did not have to be presented, as § 4 of the Statute of 1889, providing that the person sustaining a damage from a defective bridge may recover, and that action should be brought within thirty days, did not contemplate presenting the claim to the county board. Hollingsworth v. Saunders County. 36 Neb. 141.

And where an action for damages to realty was brought against the county within twelve months from the time the cause of action arose, the action was not barred because plaintiff failed to present the same for auditing. It was held that the bringing of the suit within the time limited was a sufficient presentation of the claim within the meaning of Ga. Code, § 507, providing that all claims against counties must be presented twelve months after they accrue or become payable, or the same are barred. Dement v. De Kalb County, 97 Ga. 733.

But in Maddox v. Randolph County, 65 Ga. 218, a county was held not liable for injuries received from a defective bridge, where the claim was not presented to the ordinary for auditing within twelve months from the time of entry, under a statute requiring all claims against counties to be presented within twelve months after they accrue or the same are barred.

In Dement v. De Kalb County, 97 Ga. 733, the case of Maddox v. Randolph County, 65 Ga. 216, was distinguished, as in that case the action was commenced after the expiration of the twelve months with no previous presentation of the claim, and this identical question had never been definitely decided by this court. It was said that Code, § 506 (act December 15, 1871), merely directed the county officials as to what they should do with such claims when presented, and did not change the pre-existing law contained in § 507, or impose upon claimants any additional burden.

In Arnett v. Decatur County Comrs. 75 Ga. 732, the court refused to decide whether or not an action was barred because of failure to present the claim to the board of county commissioners, under Ga. Code, § 507, providing for presentation of claims and barring the same unless suit is brought within twelve months, as that question was not passed upon by the court below.

Under Miss. Rev. Code, 419, art. 34, providing that any person having a just claim against any county which is disallowed may bring suit against the board of police, it was held that it was questionable whether a demand for damages arising out of a tort was "a claim" within the meaning of this section. Sutton v. Carroll County Bd. of Police, 41 Miss. 236.

In Brabham v. Hinds County Supers. 54 Miss. 363, 28 Am. Rep. 352, it was held that the Mississippi statute, providing for "demands," "accounts," and "claims" to be audited and allowed, were such liabilities of the county as were provided for by some statute.

In Chick v. Newberry & Union Counties, 27 S. C. 419, it was held that a claim for damages caused by the sinking of a county ferry boat was not such a claim as should first be presented to the county commissioners and then into court by means of appeal, as an action for damages for alleged negligence on the part of the county commissioners should not be left for them to be judges in their own case.

In Prady v. New York City & County Supers. 2 Sandf. 460, Affirmed in 10 N. Y. 260, it was said that 1 N. Y. Rev. Stat. 385, § 4, providing that accounts for county charges of every description shall be presented to the board to be audited by them, and 1 Rev. Stat. 384, tit. 3, § 1, providing that where any "cause of action" shall exist between a county and an individual such proceedings shall be had at law or in equity for trying and finally settling the same, in like manner and with like effect as in similar suits or proceedings between individuals and corporations, were "intended to provide a remedy against a county for such causes of action, and no other, as could not be presented to and examined and allowed by the board of supervisors, as county charges of this class would be claims for the malfeasances of county officers and claims arising from torts for which the county may be liable."

In Newman v. Livingston County Supers. 45 N. Y. 689, it was said that claims growing out of malfeasance of county officers and claims for which the county may be liable arising from torts are not necessarily to be presented for examination and allowance.

Where a county treasurer had misappropriated town moneys, and used the same for the benefit of the county, it was said: "While this has been styled an action for money had and received by the

The stream, dam, and property in question are all situated in the county of Hennepin, and whatever was done by the county commissioners was done in pursuance of apparent legislative authority, and under a legislative act in terms conferring the power to act in the manner admitted and proved. Some of these acts were done pursuant to legislative enactments prior to the passage of chapter 381, Special Laws 1891, but the dam in question was erected subsequent to the passage of that act, and by virtue of its apparent authority; and it is this act which appellant's counsel concedes to have been unconstitutional, and hence he asserts that, the acts of the board of county commissioners being tortious and unauthorized, the defendant is not liable in damages for whatever the members of the board may have done in the premises,—in other words, that Hennepin county had no right to build the dam in question, and therefore the county is not liable for the resultant damages. But this contention is inconsistent with defendant's defense as alleged in its answer. There it expressly affirms the doings of its official board; alleges that its acts were lawful, and that it did no more than it had a legal right to do, in the erection and maintenance of said dam. It not only fails to plead that the acts complained of were *ultra vires*, but it adopts, assumes, and ratifies the acts complained of, and, by its pleadings, insists that such acts were right, proper, and legal, and also insists that such acts were performed under a public necessity. This is therefore not a mere act of negligence of the board of county commissioners in the performance of an official duty, but an active and affirmative tort, done under claim of statutory authority and duty, and justified upon such ground by de-

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county to and for the use of the town it is really an action based upon wrong,—the misappropriation of the money by the county through its agent the treasurer;" and it was held that where a claim against a county is one based upon the wrong committed by or attributable to it, the claimant is not bound to submit it to the board of supervisors for audit and allowance. Kilbourne v. Sullivan County Supers. 137 N. Y. 170.

In McClure v. Niagara County Supers. 50 Barb. 594, which was an action under the statutory liability for damages by mobs, it was held that it was not necessary to present the claim to the board of supervisors of the county for allowance before the action was commenced.

In MARKEY v. QUEENS COUNTY it was contended by the respondent that the claim should have been presented to the county for auditing before suit. The court of appeals did not refer to this question in the opinion, which denied any recovery for injury from a defective bridge.

But in Albrecht v. Queens County, 84 Hun, 399, it was said that if a claim for damages for a defective bridge could be maintained it should first be submitted to the board of supervisors, under N. Y. Laws 1892, chap. 686, art. 2, § 12, subs. 2, providing that the board of supervisors shall annually audit all accounts and charges against the county.

IX. *Summary.*

In summarizing the foregoing cases it may be said that the weight of authority is conclusive against imposing any implied liability on counties for negligence in the construction, care, and use of public property, or for torts or negligence of county employees, and as the authorities are so many and set forth in the above note, they are not recapitulated.

The exceptional cases imposing implied liability for injuries caused by defective bridges may be resolved into those of four states, Maryland, Pennsylvania, Iowa, Indiana, but the recent Indiana cases have overruled all the former cases and are now in line with the weight of authority, and in Iowa the exceptional rule is not applied to small bridges.

In regard to roads, Maryland, which makes an exception and applies the same rule as that governing bridges, stands alone.

In regard to personal injuries from negligence of an employee, in a Missouri case, a liability was affirmed on the ground that the injury arose in discharge of a self-imposed duty not enjoined by any law, which is a very fine-drawn distinction.

For injury from operating a drawbridge we have a Louisiana case and a New Jersey case.

For injuries to real property from locating dams or bridges, there is some conflict. Some of the affirmative cases can be sustained on the theory of taking or damaging property without compensation.

For infringement of patent the weight of authority is in favor of imposing a liability, and this is worked out through the Federal statute.

The reasoning in the negative cases, which accept Russell v. Men of Devon as the leading case, generally is based on the doctrine that a county is a subordinate political division of the state, and stands in the same attitude as a state, which cannot be sued without a statute authorizing such an action. A distinction is also made in nearly all the cases between counties and cities by denying the same liability against counties that is applied to cities; but many cases, whilst following the rule denying a liability, affirm that there is no distinction in principle between the two corporations. Of course in this summary no attention is paid to cases where the liability is imposed by statute, and it may be said in conclusion, without admitting the soundness of the principle evolved in so many cases, that the mass of authorities deny the liability of counties for negligence or tort of its officials, and refuse to apply the same liability as in city cases.

The exceptional cases in the above note imposing an implied liability on counties for negligence or torts of counties are as follows:

For injuries to persons from defective bridges: Park v. Adams County Comrs. 3 Ind. App. 536; Morgan County Comrs. v. Pritchett, 85 Ind. 68; Pritchett v. Morgan County Comrs. 62 Ind. 210; House v. Montgomery County Comrs. 60 Ind. 580, 28 Am. Rep. 657; Bonebrake v. Huntington County Comrs. 141 Ind. 62; Fulton County Comrs. v. Rickel, 106 Ind. 501; State, Roundtree, v. Gibson County Comrs. 80 Ind. 478, 41 Am. Rep. 421; Jackson County Comrs. v. Nichols, 139 Ind. 611; Vaught v. Johnson County Comrs. 101 Ind. 123; Gibson County Comrs. v. Emmerson, 95 Ind. 579; Patton v. Montgomery County Comrs. 96 Ind. 131; Sullivan County Comrs. v. Arnett, 116 Ind. 433; Knox County Comrs. v. Montgomery, 109 Ind. 69; Clark County Comrs. v. Brod, 3 Ind. App. 585; Spicer v. Elkhart County Comrs. 126 Ind. 369; Goshen v. Myers, 119 Ind. 198; Shelby County Comrs. v. Deprez, 87 Ind. 509; Wabash County Comrs. v. Pearson, 120 Ind. 426; Allen County Comrs. v. Bacon, 96 Ind. 31; Howard County Comrs. v. Legg, 110 Ind. 479; Porter County Comrs. v. Dombke, 94 Ind. 72; Allen County Comrs. v. Creviston, 133 Ind. 39; Sullivan County Comrs. v. Sisson, 2 Ind. App. 311; La Porte County Comrs. v. Ellsworth, 9 Ind. App. 566; Apple v. Marion County

fendant, and that it was performed within the scope of the board's official duty. It comes into court, and, by its pleadings and evidence, attempts to uphold the wrongs it has done by its officials, and persists in the continuance of this wrong, but, by contention of counsel, insists that it is not liable in damages, because its acts were unconstitutional, unauthorized, and void. Not only this, but it insists upon retaining the benefits of the illegal acts of its officers. It is not willing that the wrong shall cease, but aggressively insists that it will make no reparation for its past tort, and that it has a legal right to enjoy in the future all the benefits secured through an unconstitutional law. If valuable property rights can thus be taken, destroyed, diverted, and injured without compensation, there will be but little safety in the private ownership of property. We may concede the general rule to be that the defendant would not be responsible for the unauthorized and unlawful acts of its officer, done *colore officii*; but when the defendant itself expressly authorizes such act, or, when done, adopts and ratifies it, and retains and enjoys its benefits, and persists in so doing, it is liable in damages. The law applicable to a case of this kind is well stated in the case of *Thayer* v. *Boston*, 19 Pick. 511, 31 Am. Dec. 157, as follows: There is a large class of cases, in which the rights of both the public and of individuals may be deeply involved, in which it cannot be known at the time the act is done whether it is lawful or not. The event of a legal inquiry, in a court of justice, may show that it was unlawful. Still, if it was not known and understood to be unlawful at the time; if it was an act done by the officers having competent authority, either by express vote of the city government, or by the nature of the duties

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Comrs. 127 Ind. 553; Shelby County Comrs. v. Blair, 8 Ind. App. 574; Parke County Comrs. v. Wagner, 138 Ind. 609; Boone County Comrs. v. Mutchler, 137 Ind. 140; Reinhart v. Martin County Comrs. 9 Ind. App. 572; Madison County Comrs. v. Brown, 89 Ind. 48; Parke County Comrs. v. Sappenfield, 10 Ind. App. 609. (But these Indiana cases were all overruled in the following cases: Johnson County Comrs. v. Hemphill, 14 Ind. App. 219; Cowan v. Adams County Comrs. 142 Ind. 699; JASPER COUNTY COMRS. v. ALLMAN; Montgomery County Comrs. v. Coffenberry, 14 Ind. App. 701.)

In other states the cases affirming liability are: Cooper v. Mills County, 69 Iowa, 350; Morgan v. Fremont County, 92 Iowa, 644; Ferguson v. Davis County, 57 Iowa, 601; Huff v. Poweshiek County, 60 Iowa, 529; Roby v. Appanoose County, 63 Iowa, 114; Davis v. Allamakee County, 40 Iowa, 217; Weirs v. Jones County, 80 Iowa, 351; Casey v. Tama County, 75 Iowa, 655; Krause v. Davis County, 44 Iowa, 141; Hughes v. Muscatine County, 44 Iowa, 672; Huston v. Iowa County, 43 Iowa, 456; Wilson v. Jefferson County, 13 Iowa, 181; Brown v. Jefferson County, 16 Iowa, 339; Albee v. Floyd County, 46 Iowa, 177; Moreland v. Mitchell County, 40 Iowa, 394; Van Winter v. Henry County, 61 Iowa, 684; Newcomb v. Montgomery County, 79 Iowa, 487; Nims v. Boone County, 68 Iowa, 642; Kendall v. Lucas County, 28 Iowa, 395; Homan v. Franklin County, 98 Iowa, 692; Kennedy v. Cecil County Comrs. 69 Md. 65; Baltimore County Comrs. v. Baker, 44 Md. 1; Eyler v. Alleghany County Comrs. 49 Md. 257, 33 Am. Rep. 249; Chesapeake & O. Canal Co. v. Alleghany County Comrs. 57 Md. 201, 40 Am. Rep. 430; Prince George's County Comrs. v. Burgess, 61 Md. 29, 48 Am. Rep. 88; Humphreys v. Armstrong County, 3 Brewst. (Pa.) 49; Armstrong County v. Clarion County, 66 Pa. 218, 5 Am. Rep. 368; Shadler v. Blair County, 136 Pa. 439.

To travelers from defective roads: Harford County Comrs. v. Hamilton, 60 Md. 340, 45 Am. Rep. 739; Anne Arundel County Comrs. v. Duckett, 20 Md. 468, 83 Am. Dec. 557; Alleghany County Comrs. v. Broadwaters, 69 Md. 533; Calvert County Comrs. v. Gibson, 36 Md. 229; Kennedy v. Cecil County Comrs. 69 Md. 65.

To persons from condition of buildings:

Escape of prisoner: Brown County Comrs. v. Butt, 2 Ohio, 348; Richardson v. Spencer, 6 Ohio, 13. But these cases were overruled in Hamilton County Comrs. v. Mighels, 7 Ohio St. 109.

To persons from negligence or torts of employees: Hannon v. St. Louis County, 62 Mo. 313.

Injuries to real property:

From construction or use of bridge: Tyler v. Tehama County, 109 Cal. 618 (Const.); Chester County v. Brower, 117 Pa. 647 (Const.); Harford County Comrs. v. Wise, 71 Md. 43; Riddle v. Delaware County, 156 Pa. 643.

Injury to property from operating a drawbridge: Houston v. Police Jury, 3 La. Ann. 566; Ripley v. Essex & Hudson Counties Chosen Freeholders, 40 N. J. L. 45.

By roads and road officers:

Injunction and damages: Coburn v. San Mateo County, 75 Fed. Rep. 520; Cummings v. Kendall County, 7 Tex. Civ. App. 164; McCann v. Sierra County, 7 Cal. 121.

Injury to property from dam: SCHUSSLER v. HENNEPIN COUNTY COMRS.

Injury for sewage nuisance: Lefrois v. Monroe County, 48 N. Y. Supp. 519.

Infringement of patent: May v. Mercer County, 30 Fed. Rep. 246; May v. Ralls County, 31 Fed. Rep. 473; May v. Johnson County, Fed. Cas. No. 9, 334; May v. Fond du Lac County, 27 Fed. Rep. 695; May v. Logan County Comrs. 30 Fed. Rep. 250; May v. Saginaw County, 32 Fed. Rep. 629; May v. Jackson County, 35 Fed. Rep. 710.

Tearing down building and taking vault: Rhoda v. Alameda County, 69 Cal. 523.

On dissolution of injunction: Freeman v. Lee County Supers. 66 Miss. 1.

Suffering hog to become diseased: Rowland v. Kalamazoo County Supers. of Poor, 49 Mich. 553.

Diverting water (not decided): Fenton v. Salt Lake County, 3 Utah, 423.

Under the statute of Winton, 13 Edw. I., providing that if the country does not apprehend the felons within forty days an action lies against the inhabitants of the hundred where the robbery was committed for the money or goods whereof the party was robbed, and under some other similar statutes making the hundred liable for destroying turnpikes, cutting hop binds or destroying corn to prevent exportation, for wounding officers of the customs, demolition of works, many cases are given in Comyn's Dig. title, *Hundred*, c, 2-5.

For liability of county for property destroyed by mob, see Gianfortone v. New Orleans (C. C. E. D. La.) 24 L. R. A. 592, *note*.

Cases in regard to counties like San Francisco and St. Louis counties, when the city and county are the same in territory, are omitted from this note.

This note is not intended to include injunction suits against counties for nuisances unless damages were claimed, or cases under eminent domain where proceedings were had but were void or irregular, or cases against counties for collecting an illegal tax. L. T.

and functions with which they are charged, by their offices, to act upon the general subject-matter; and especially if the act was done with an honest view to obtain for the public some lawful benefit or advantage,—reason and justice obviously require that the city, in its corporate capacity, should be liable to make good the damage sustained by an individual in consequence of the acts thus done. It would be equally injurious to the individual sustaining damage, and to the agents and persons employed by the city government, to leave the party injured no means of redress, except against agents employed, and by what at the time appeared to be competent authority to do the acts complained of, but which are proved to be unauthorized by law. . . . The court is therefore of opinion that the city of Boston may be liable in an action on the case, where acts are done by its authority which would warrant a like action against an individual, . . . or where, after the act has been done, it has been ratified by the corporation by any similar act of its officers."

We do not pass upon the constitutionality of chapter 381, Special Laws 1891, relative to the proceeding had by the board of county commissioners, but our opinion in this respect is based upon the concession of appellant's counsel. Points raised by counsel and not discussed in this opinion have been examined and considered, but are deemed immaterial.

Judgment affirmed.

WASHINGTON SUPREME COURT.

R. T. SMITH, and Wife, *Respts.*,
v.
John H. ALLEN and Wife, Impleaded, etc., *Appts.*

(.....Wash.....)

1. **The legislative adoption of so much of the common law** as is applicable to the condition of the state of Washington does not include vendor's liens.

2. **A vendor's lien for unpaid purchase money** does not arise by implication on a conveyance of land without creating a lien by any reservation in the deed or any agreement between the parties.

(October 6, 1897.)

APPEAL by defendants Allen and wife from a judgment of the Superior Court for Clallam County in favor of plaintiffs in an action brought to foreclose an alleged vendor's lien. *Reversed.*

The facts are stated in the opinion.

Mr. **J. C. Allen,** for appellants:

The court should have granted the change of venue.

2 Hill's Code, §§ 158, 159, 161.

It was properly shown to the court that neither of the defendants resided in Clallam county, or had ever resided there, but that, on the contrary, all of the defendants were, and had for many years been, residents of Kings county.

Where property has been conveyed by deed, absolute upon its face, there is in this state no vendor's lien for unpaid purchase money, unless such lien is reserved in the deed, or by agreement of the parties.

Ahrend v. *Odiorne*, 118 Mass. 261, 19 Am. Rep. 449; *Simpson* v. *Mundee*, 3 Kan. 176; *Brown* v. *Simpson*, 4 Kan. 76; *Greeno* v. *Barnard*, 18 Kan. 518; *Kauffelt* v. *Bower*, 7 Serg. & R. 64; *Hiester* v. *Green*, 48 Pa. 96, 86 Am. Dec. 569; *Edminster* v. *Higgins*, 6 Neb. 265; *Philbrook* v. *Delano*, 29 Me. 410; *Peck* v. *Culberson*, 104 N. C. 425; *Richards* v. *Arms Shingle & Lumber Co.* 74 Mich. 57; *Dean* v. *Dean*, 6 Conn. 285; *Arlin* v. *Brown*, 44 N. H. 102; *Perry* v. *Grant*, 10 R. I. 334; *Wragg* v. *Comptroller General*, 2 Desauss. Eq. 509; 2 Jones, Liens, §§ 1061 *et seq.*

While it is true a great many of the states have adopted the lien, most all of them in later cases have lamented the doctrine, and in a great number it has been abolished by statute.

Conover v. *Warren*, 6 Ill. 498, 41 Am. Dec. 196; *Hammond* v. *Peyton*, 34 Minn. 529; *Porter* v. *Dubuque*, 20 Iowa, 440; *Bayley* v. *Greenleaf*, 20 U. S. 7 Wheat. 46, 5 L. ed. 393.

Even Lord Eldon looked upon the doctrine with disfavor.

Mackreth v. *Symmons*, 15 Ves. Jr. 329.

Before a party can be sued and a judgment obtained against him for the contract price of real estate it must be made to appear that a deed to the property has been made and tendered. It is true that in the case at bar a conveyance had been made, but appellants contend that the deed at its inception was a mortgage; that it was executed by the plaintiff and accepted by Allen as security. If this is so, then no subsequent agreement, unless made by deed or in such a manner as would satisfy our statute, could change the nature of the conveyance.

1 Jones, Mortg. 4th ed. § 340; *Henry* v. *Davis*, 7 Johns. Ch. 40; *Odell* v. *Montross*, 68 N. Y. 500; *Smith* v. *Brand*, 64 Ind. 427; *Hart* v. *Eppstein*, 71 Tex. 752; 1 Dembitz, Land Titles, § 96, p. 730, note No. 125.

Mr. **George C. Hatch,** for respondents:

The grantor's implied lien for unpaid purchase money exists in this state by force of having incorporated into its law the common law of England.

28 Am. & Eng. Enc. Law, topic, *Vendor's Lien.*

NOTE.—As to the adoption of the common law, see McKennon v. Winn (Okla.) 22 L. R. A. 501, and *note*; also Gatton v. Chicago, R. I. & P. R. Co. (Iowa) 28 L. R. A. 556; and Davis v. Chicago, M. & St. P. R. Co. (Wis.) 33 L. R. A. 654.

See also 43 L. R. A. 551.

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

Action instituted by plaintiffs (respondents) against defendants (appellants) to enforce a vendor's lien upon certain real property in Clallam county. In substance, the complaint is that respondents sold and conveyed by absolute deed to appellants 80 acres of land, situated in Clallam county, and that defendants promised and agreed to pay the sum of $1,000 in instalments from time to time, as they were able, and as plaintiffs needed the same; that the agreement to purchase was in writing; and that defendants paid on the contract the sum of $635.62, and refused to pay the balance. The complaint concludes with a prayer for judgment against the defendants for the balance of the sum alleged to be due on the purchase price of the land, and that it be declared a first lien on the premises, as a vendor's lien, and that the specified premises be sold to satisfy the same.

Defendants at the time of the commencement of the action were all residents of King county, and the defendants Allen each appeared and demurred to the complaint, and filed a motion to change the venue to King county. Sufficient affidavits showing the residence of all the defendants in King county, and also affidavits of merit, were at the same time filed. The superior court denied the motion for a change of venue on the ground that the suit was one to enforce a vendor's lien for balance due of the purchase price of the premises conveyed by respondents to defendant Allen. After the demurrer was overruled, the defendants answered, and a trial was had, and judgment for plaintiffs, with a decree establishing a vendor's lien, and ordering a sale of the premises before mentioned. The superior court evidently overruled the motion for a change of venue on the ground that the action was local, because of the enforcement of a vendor's lien. Sections 158, 159, 161, 2 Hill's Code, control the venue of the action. The defendants having at the proper time shown that they were residents of King county, the motion to change the venue was not addressed to the discretion of the court, but was a matter of right with the defendants.

The question of jurisdiction to try the action is determined, not by the remedy requested, but by what the facts alleged in the complaint entitle plaintiffs to receive; and thus the question presented for decision here is whether real property which has been conveyed by absolute deed is subject to a vendor's lien for unpaid purchase money, where no such lien has been reserved by the deed or by any agreement between the parties. No case in this state has been called to our attention where the question has necessarily arisen and been decided heretofore. It is true, the expression "vendor's lien" has been used perhaps a number of times by the court, but where the lien itself, as the foundation of a right, was not necessarily involved. The policy deduced from the uniform course of legislation in this state relative to conveyances of real estate and the title thereto has been to enlarge the scope of the recordation of all instruments affecting real estate. Only conveyances by deed are recognized, and encumbrances are required to be placed on record. This is true of agreements subjecting real property to voluntary liens or encumbrances, as in the case of mortgages, and is also required in that large class of claims of lien which are authorized by statute. Evidently the policy of our registry acts is against secret liens. The vendor's lien, originally, as recognized in England, was devised by courts of equity, to enforce the rights of a grantor of real property against the grantee, who might remain in possession after the execution of an absolute deed, and yet refuse to pay the purchase price, or any balance remaining due thereon. The inability to subject land by process of law to execution for a simple-contract debt was recognized by the English chancellors as requiring a remedy. Hence the invention of a lien in favor of the vendor for the purchase price promised to be paid for land. The vendor's lien, at the time it originated and was enforced, was also less inconvenient and injurious against innocent purchasers or encumbrancers of land in England than in this country. The general policy of the law in England did not facilitate commerce in land, as here. The law there was rather favorable towards holding landed estates together, and did not assume to make transfers easy. Thus real estate was usually improved and regularly cultivated, the ownership long established and well known, and the transfers comparatively few, and usually better known than among our people. Here land is essentially a subject of trade and commerce, transfers are easy and simple, and purchasers and encumbrancers look to the record for their information. The vendor's lien in England seems to have been involved in some uncertainty, and its limitations not very well understood until the case of *Mackreth* v. *Symmons*, 15 Ves. Jr. 329, decided in 1808 by Lord Eldon. In this case the learned chancellor thought "the doctrine is probably derived from the civil law as to goods." The case, however, reviews the doctrine, and the source of its origin, and the reasons and authorities by which it is supported. The final grounds upon which it has been rested are natural equity, the supposed intention of the parties, and a trust arising out of the unconscientiousness of the vendee's holding the land without paying the price. Mr. Justice Gibson of Pennsylvania, in *Kauffelt* v. *Bower*, 7 Serg. & R. 64, meets this argument thus: "The implication that there is an intention to reserve a lien for the purchase money in all cases where the parties do not, by express acts, evince a contrary intention, is in almost every case inconsistent with the truth of the fact, and in all instances, without exception, in contradiction of the express terms of the contract, which purports to be a conveyance of everything that can pass." But the theory that a trust arises out of the unconscientiousness of the purchaser would construe the nonperformance of every promise made in consideration of a conveyance of property to the promisor into a breach of trust, and would attach the trust, not merely to the purchase money which he agreed to pay, but to the land, which he never agreed to hold for the benefit of the supposed *cestui que trust*. The earliest cases upon this subject in England were decided long after the first colonial settlements

in this country. Lord Eldon, in *Mackreth* v. *Symmons*, 15 Ves. Jr. 329, himself said, "It has always struck me, considering this subject, that it would have been better at once to have held that the lien should exist in no case, and the vendor should suffer the consequences of his want of caution, or to have laid down the rule the other way so distinctly that a purchaser might be able to know without the judgment of a court, in what cases it would and in what it would not exist," but felt himself obliged to declare, as the result of all the authorities, that it was clear that different judges would have determined the same case differently. The most plausible foundation of the English doctrine would seem to be that justice required that the vendor should be enabled, by some form of judicial process, to charge the land, in the hands of the vendee, as security for the unpaid purchase money. The doctrine of vendor's lien has never been affirmed by the Supreme Court of the United States, except where established by the local law. In *Bayley* v. *Greenleaf*, 20 U. S. 7 Wheat. 46, 5 L. ed. 393, Mr. Chief Justice Marshall observes: "It is a secret invisible trust, known only to the vendor and vendee and to those to whom it may be communicated in fact. To the world, the vendee appears to hold the estate, devested of any trust whatever; and credit is given to him in the confidence that the property is his own in equity, as well as law. A vendor relying upon this lien ought to reduce it to a mortgage, so as to give notice of it to the world. If he does not, he is, in some degree, accessory to the fraud committed on the public, by an act which exhibits the vendee as the complete owner of an estate on which he claims a secret lien." Says Mr. Justice Gray in *Ahrend* v. *Odiorne*, 118 Mass. 261, 19 Am. Rep. 449: "The decisions in the courts . . . in favor of the doctrine, which are collected in the notes to 2 Sugden on Vendors, 8th Am. ed. chap. 19, suggest no reasons and afford no grounds why we should now for the first time adopt in this commonwealth a doctrine which has never been supposed by the profession to be in force here; which would introduce a new exception to the statute of frauds; which, as experience elsewhere has shown, tends to promote uncertainty and litigation; and which appears to us to be unfounded in principle, unsuitable to our condition and usages, and unnecessary to secure the just rights of the parties. If no third person has acquired any rights in the land by bona fide attachment or conveyance, the original vendor may secure payment of the debt due him for the purchase money by the usual attachment on mesne process. If any third person has acquired rights in the property, there is no reason why equity, any more than the common law, should interpose to defeat them." Under our statutes the vendor may obtain his judgment for the purchase money, or any part thereof, which immediately becomes a lien of record upon the land sold, and under execution he may have the land sold in satisfaction of his judgment; and that, too, freed from any homestead or other claim of exemption. Thus, the reason for the maintenance of the lien of the vendor is gone, and the rule has never been applicable to our condition. The adoption of the common law of England by legislative enactment in this state adopts so much of that law as is applicable to our condition, and the lien devised in favor of the vendor by the English chancellors was inapplicable to the legislation and existing conditions in this state. *Ahrend* v. *Odiorne*, 118 Mass. 261, 19 Am. Rep. 449; *Simpson* v. *Mundee*, 3 Kan. 172; *Brown* v. *Simpson*, 4 Kan. 76; *Greeno* v. *Barnard*, 18 Kan. 518; *Kauffelt* v. *Bower*, 7 Serg. & R. 64; *Heister* v. *Green*, 48 Pa. 96, 86 Am. Dec. 569; *Edminster* v. *Higgins*, 6 Neb. 265; *Philbrook* v. *Delano*, 29 Me. 410; *Peck* v. *Culberson*, 104 N. C. 425; *Richards* v. *Arms Shingle & Lumber Co.* 74 Mich. 57; *Dean* v. *Dean*, 6 Conn. 285; *Arlin* v. *Brown*, 44 N. H. 102; *Perry* v. *Grant*, 10 R. I. 334; *Wragg* v. *Comptroller General*, 2 Desauss. Eq. 509; *Frame* v. *Sliter*, 29 Or 121, 34 L. R. A. 690; 2 Jones, Liens, § 1061.

The change of venue from Clallam to King county should have been granted the defendants. *The cause is reversed*, with directions to the superior court to proceed in conformity to this decision.

Scott, Ch. J., and **Dunbar**, **Anders**, and **Gordon**, JJ., concur.

MARYLAND COURT OF APPEALS.

Marion DUCKETT *et al.*, *Appts.*,
v.
NATIONAL MECHANICS' BANK of Baltimore *et al.*

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

1. A check stating that it is "for deposit to credit of" a person named, without adding the word "Trustee" to his name, although it contains a further clause stating that it is "the balance of purchase money due him as trustee," does not impress the funds with a trust so as to prevent a bank in which he deposits it from crediting the check to his individual account.

2. A check stating that it is for "deposit to the credit of" a person named, with the word "Trustee" added to his name, is an explicit notification to the bank in which he deposits it that he is not the actual owner of the money, and if the bank credits it to his individual account, and loss ensues to the trust estate by reason of his drawing out the fund by checks on his personal account, the bank is liable for participation in the breach of trust.

3. A bank is not responsible for the use of trust funds made by a trustee unless it knowingly participates in the breach of trust, or profits by the fraud.

4. A ratification by a trustee of the act

NOTE.—As to the effect of depositing money in a bank in trust for third persons, see Cunningham v. Davenport (N. Y.) 32 L. R. A. 373, and *note*; and Bath Sav. Inst. v. Hathorn (Me.) 32 L. R. A. 377.

of a bank in placing to his individual credit a check which showed on its face that it was due to him as trustee cannot relieve the bank from liability to the trust estate if the funds are lost by his checking them out on his personal account.

5. A defense of the statute of limitations cannot be invoked by a participant in a breach of trust any more than by the trustee himself.

6. The statute of limitations must be invoked by plea or answer in order to be available as a defense.

(December 1, 1897.)

APPEAL by plaintiffs from a decree of the Circuit Court of Baltimore City in favor of the defendant bank in a suit to hold it liable for participation in a misappropriation of trust funds. *Reversed.*

The facts are stated in the opinion.

Messrs. **Marion Duckett, Charles H. Stanley,** and **David S. Briscoe,** for appellants:

Equity has a natural and primary jurisdiction superadded to any legal rights that the suitors may have, and concurrent with them, and it is no bar that an action at law may have been sustained on the same state of facts.

2 Perry, Tr. § 843; *Swift* v. *Williams,* 68 Md. 237; *Central Nat. Bank* v. *Connecticut Mut. L. Ins. Co.* 104 U. S. 54-63, 26 L. ed. 693-698; *Stewart* v. *Baltimore Firemen's Ins. Co.* 53 Md. 564.

The trustees must sue and not join the *cestui que trust* if the trust is alive.

Abell v. *Brown,* 55 Md. 217; *Swift* v. *Williams,* 68 Md. 237.

A participant in a breach of trust, or an *ex maleficio* trustee, cannot plead limitations against the rights of the rightful owner to recover trust property or trust funds, because he who is thus placed becomes a trustee, and not until fraud is discovered or the breach made known, if then, does the act of limitations begin to run.

2 Perry, Tr. §§ 828, 832, 840, 859, 861; Code, art. 57, § 13.

The true owner of a fund traced to the possession of another has a right to have it restored, not as a debt due and owing, but because it is his property wrongfully withheld from him.

Englar v. *Offutt,* 70 Md. 78; *Swift* v. *Williams,* 68 Md. 237; *Central Nat. Bank* v. *Connecticut Mut. L. Ins. Co.* 104 U. S. 54, 26 L. ed. 693; *Union Nat. Bank* v. *Goetz,* 138 Ill. 127, 32 Am. St. Rep. 125, note; *Englar* v. *Offutt,* 70 Md. 78; *Ferchen* v. *Arndt,* 46 Am. St. Rep. 603, see note, p. 608, 26 Or. 121, 29 L. R. A. 664.

Mingling the trust funds with his own is a breach of trust.

1 Perry, Tr. § 447 (1882).

A trustee has no power to sell and dispose of trust property for his own use and at his own mere will.

Third Nat. Bank v. *Lange,* 51 Md. 144, 34 Am. Rep. 304.

The insertion of the word 'trustee' after the name of a stockholder indicates and gives notice of a trust.

Central Nat. Bank v. *Connecticut Mut. L. Ins. Co.* 104 U. S. 54, 26 L. ed. 693; *Shaw* v. *Spencer,* 100 Mass. 382, 1 Am. Rep. 115, 97 Am. Dec. 107; 2 Perry, Tr. 1882, p. 463, § 814, note 2; *Stewart* v. *Firemen's Ins. Co.* 53 Md. 578; *Lowry* v. *Commercial & F. Bank,* Taney, 330; Morse, Banks & Banking, § 604; *Marbury* v. *Ehlen,* 72 Md. 216; *Jaudon* v. *National City Bank,* 8 Blatchf. 439, 82 U. S. 15 Wall. 165, 21 L. ed. 142.

A trustee cannot dispose of trust funds in his hands without an express and previous order of the court having jurisdiction over the trust estate.

Tilly v. *Tilly,* 2 Bland, Ch. 425; *Third Nat. Bank* v. *Lange,* 51 Md. 144, 34 Am. Rep. 304; *Abell* v. *Brown,* 55 Md. 223.

Messrs. **Barton & Wilmer, James M. Ambler,** and **Randolph Barton,** Jr., for appellees:

The rule that limitations cannot be pleaded by a trustee has a qualification that limits it to the case of an express or acknowledged trust, or a fraudulent collusion with a trustee.

Lewin, Tr. 9th ed. p. 983.

Limitations will bar as to trusts created by operation of law, though it may not as to express trusts.

McDowell v. *Goldsmith,* 6 Md. 319, 61 Am. Dec. 305; *Re Leiman,* 32 Md. 225, 3 Am. Rep. 132; *Weaver* v. *Leiman,* 52 Md. 708; *Walker* v. *Manhattan Bank,* 25 Fed. Rep. 255.

The mere fact that a trustee deposits and disburses a fund under his absolute control, as an individual, instead of as trustee, raises no presumption that his conduct is fraudulent or improper.

Kirby v. *State,* 51 Md. 383; *Munnerlyn* v. *Augusta Sav. Bank,* 88 Ga. 337; Bolles, Banks and Their Depositors, § 107, p. 111; Morse, Banks & Banking, 3d ed. § 317, p. 541; *Goodwin* v. *American Nat. Bank,* 48 Conn. 567.

Clagett had the power to place the fund to his individual account without any right or duty on the bank's part to protest; and his ratification of the bank's act is equivalent to a previous authority to the bank to so deposit the fund.

State Nat. Bank v. *Dodge,* 124 U. S. 346, 31 L. ed. 463.

Money is deposited in a bank by a trustee, or subject to his order, just as in the case of an individual, for safe-keeping and for convenience in handling, and not with the object of making the bank an overseer over the trustee and a guarantor of his fidelity.

Walker v. *Manhattan Bank,* 25 Fed. Rep. 255; Bolles, Banks and their Depositors, § 40*c*, p. 57; 1 Morse, Banks & Banking, 3d ed. § 317, p. 540; *Central Nat. Bank* v. *Connecticut Mut. L. Ins. Co.* 104 U. S. 63, 26 L. ed. 698; *Patterson* v. *Marine Nat. Bank,* 130 Pa. 431; *Essex County Chosen Freeholders* v. *Newark City Nat. Bank,* 48 N. J. Eq. 53; *State Nat. Bank* v. *Reilly,* 124 Ill. 469; *Swartwout* v. *Mechanics' Bank,* 5 Denio, 555; *Goodwin* v. *American Nat. Bank,* 48 Conn. 567; *Swift* v. *Williams,* 68 Md. 252; 2 Dan. Neg. Inst. § 1612*a*; 2 Morse, Banks & Banking, § 432, p. 711; *Munnerlyn* v. *Augusta Sav. Bank,* 88 Ga. 336.

The simple case of a bank dealing with a trustee depositor and treating his rights over a trust deposit in his name just as those of an in-

dividual having an individual deposit, is, of course, to be distinguished from that of a bank attempting to assert a lien for a private debt due to itself from the trustee, against a fund known to be held by the trustee in a fiduciary capacity. For in such case the bank would be presumed to be a knowing participant in the profits of a fraud.

See *Walker* v. *Manhatlan Bank*, 25 Fed. Rep. 255; *Central Nat. Bank* v. *Connecticut Mut. L. Ins. Co.* 104 U. S. 64, 26 L. ed. 698; *Union Stock Yards Nat. Bank* v. *Gillespie*, 137 U. S. 421, 34 L. ed. 728; *Bank of Greensboro* v. *Clapp*, 76 N. C. 482.

If the trustee pays a private debt due the bank by a check upon a trust fund on deposit with it, the bank is not necessarily bound to presume that the payment is unlawful.

Central Nat. Bank v. *Connecticut Mut. L. Ins. Co.* 104 U. S. 63, 26 L. ed. 698; *Loring* v. *Brodie*, 134 Mass. 453.

The present case, moreover, is very different from that of a trustee offering for sale a note payable to him as trustee. Such a note is not negotiable and one buys it at his peril.

Third Nat. Bank v. *Lange*, 51 Md. 138, 34 Am. Rep. 304.

Or from the case of a trustee attempting to pledge trust property.

Shaw v. *Spencer*, 100 Mass. 382, 1 Am. Rep. 115, 97 Am. Dec. 107; *Loring* v. *Brodie*, 134 Mass. 470.

Or from an attempted sale of stock standing in the name of a trustee.

Marbury v. *Ehlen*, 72 Md. 206; *Stewart* v. *Fireman's Ins. Co.* 53 Md. 564; *Lowry* v. *Commercial & F. Bank*, Taney, 310.

In the case of stock there is no presumption of the trustee's right to sell.

Marbury v. *Ehlen*, 72 Md. 217.

A bank account is meant to be checked against.

Central Nat. Bank v. *Connecticut Mut. L. Ins. Co.* 104 U. S. 64, 26 L. ed. 698.

Even in the case of stock, where the stock merely stands in the name of the holder as "trustee," with nothing else to indicate the name or nature of the trust, and no means of discovery, by any reasonable or ordinary inquiry, the purchaser will not be put upon inquiry.

Graffin v. *Robb*, 84 Md. 455; *Albert* v. *Baltimore*, 2 Md. 159.

The cases where the word "trustee" has been held to put purchasers of stock upon inquiry, have been those in which the name and object of the trust were easily ascertainable without inquiry from the trustee.

Marbury v. *Ehlen*, 72 Md. 206; *Stewart* v. *Firemen's Ins. Co.* 53 Md. 564.

Clagett knew of and approved the action of the bank in thus entering the deposits, and if he had complete power to direct the bank so to credit them, or so to transfer them when deposited, it can make no difference that he approved and adopted an act, which affected merely the form, and not the extent, of his control over the fund, instead of previously directing it.

2 Morse, Banks & Banking, §§ 440*b*, 471; Bolles, Banks and Their Depositors, § 36, § 41*a*, p. 54; *McEwen* v. *Davis*, 39 Ind. 112; *State Nat. Bank* v. *Dodge*, 124 U. S. 333, 334, 31 L. ed. 458, 462; *Neff* v. *Greene County Nat. Bank*, 89 Mo. 581; *Risley* v. *Phenix Bank*, 83 N. Y. 328, 38 Am. Rep. 421.

Ratification is equivalent to a previous authority.

1 Dan. Neg. Inst. § 318, p. 237.

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

These proceedings had their origin in a bill filed by the appellants against the appellees in the circuit court of Baltimore city. The appellants are trustees, who were appointed by an order of the circuit court for Prince George's county in the place and stead of Henry W. Clagett, the survivor of three trustees named in the will of John D. Bowling. To these latter—the testamentary trustees—certain funds were bequeathed by Mr. Bowling, to be held in trust for the purposes designated in the will; but as those purposes have no relation whatever to the questions presented on the record they need not be alluded to here. It is only necessary to state that the funds now in controversy formed part of the *corpus* of that trust estate. Upon the death of his associates Clagett became, under a decree of the circuit court for Prince George's county, sole trustee, and thereafter, having made default to the trust estate, was in due course removed, and the appellants were immediately appointed to discharge the trust created by the will of Mr. Bowling. Amongst the investments belonging to the trust estate in the hands of Clagett were two mortgages, each for $2,000, one due by Thomas S. Duckett and the other by Washington J. Beall. The mortgage given by Beall was foreclosed by Clagett after he became sole trustee, and the money realized from the sale was paid to him through Mr. Charles H. Stanley. The payment was made by Mr. Stanley's check which reads as follows:

Laurel, Md., February 13, 1892.

Citizens' National Bank:

Pay to the order of James Scott, cashier, $2,000, two thousand dollars, for deposit to credit of Henry W. Clagett, being the balance of purchase money due him as trustee from John R. Coale. C. H. Stanley.

When the Duckett mortgage matured the amount secured by it was paid to Clagett through Mr. Stanley by a check in these words:

State of Maryland.

Citizens' National Bank of Laurel, Laurel, Maryland, September 17, 1892:

Pay to the order of Jamas Scott, cashier, $2,024.30, two thousand and twenty-four and thirty one-hundredths dollars, to deposit to the credit of Henry W. Clagett, trustee.

C. H. Stanley.

Both of these checks were deposited in the National Mechanics' Bank of Baltimore where Clagett kept an individual or personal account and the proceeds of each were carried to his credit in that account. Clagett in his capacity as trustee had no account with the bank. The individual account of Clagett, including the proceeds of the two checks just transcribed, was drawn on from time to time by him, and

after his removal as trustee it was discovered that these funds had been dissipated and spent. Clagett was and still is insolvent. The new trustees—the present appellants—made demand upon the National Mechanics' Bank for a restitution of the amount of the two checks, claiming that the bank was accountable therefor because it had wrongfully placed the proceeds thereof to Clagett's individual account instead of to his account as trustee, and had thereby aided and participated in his breach of trust; and to enforce that demand they filed the pending bill against the bank and Clagett. Upon final hearing the circuit court of Baltimore city decreed that the bank was not liable and dismissed the bill; whereupon this appeal was taken.

The ultimate inquiry is, whether under the circumstances stated the bank is liable to make good to the new trustees the amounts of these two checks. In addition, there are subordinate questions arising by way of defense, that will be disposed of after the main one has been dealt with.

There can be no dispute that as a general principle all persons who knowingly participate or aid in committing a breach of trust are responsible for the wrong, and may be compelled to replace the fund which they have been instrumental in diverting. Every violation by a trustee of a duty which equity lays upon him, whether wilful or fraudulent, or done through negligence, or arising through mere oversight or forgetfulness, is a breach of trust; 2 Pom. Eq. Jur. § 1079. There is in such instances no primary or secondary liability as respects the parties guilty of, or participating in, the breach of trust; because all are equally amenable. That a breach of trust was committed by Clagett does not admit of a doubt. The defaulting trustee was removed because he was a defaulter. He unquestionably received the proceeds of these two checks, and those proceeds formed part of the *corpus* of the trust estate which it was his imperative duty to preserve intact. Instead of performing that duty, he spent the funds—they have disappeared, and he has not explained what he did with them—and it can make no difference for what purpose he did spend them, if by spending them he impaired the *corpus* of the trust estate; and that he did impair the *corpus* of the trust estate no one pretends to deny. Whoever knowingly aided him, or knowingly participated with him in misapplying that fund, is, by reason of so aiding and so participating, equally liable with him to make the fund good by restoring it to the trust estate; 2 Pom. Eq. Jur. § 1079. If the bank knowingly aided and participated in Clagett's breach of trust, then the bank is, beyond dispute, as responsible to the new trustees as is the defaulting trustee himself. This liability of the bank depends, however, altogether upon the contingency that it knowingly aided the trustee, Clagett, to commit the default of which he was undeniably guilty. If without knowledge of Clagett's misconduct, or if without sufficient notice to put it on inquiry that would have enabled it to ascertain that Clagett was mingling with his individual deposits, and using as his own, money that the bank knew or had the means of knowing was trust money; or if it was merely the innocent agency through which, without fault or negligence on its part, Clagett depleted the trust estate, then it was not guilty of aiding him in misappropriating the trust fund, and is not liable to restore it. In seeking, then, to solve the principal inquiry, we must look to the record for the evidence which will fasten on the bank this knowledge or notice, if in fact it possessed such knowledge or notice.

At the outset it ought to be noted that there is a marked difference between the phraseology and the legal effect of the two checks already set forth. The one is payable to Scott, cashier, for deposit to the credit of Clagett personally—that is, not in his capacity as trustee—though there is a memorandum added of which we will speak in a moment. The other check is payable to Scott, cashier, "to deposit to the credit of Henry W. Clagett, trustee." Apart from these two checks and the information which they themselves by their terms imparted, there is no pretense that the bank had any notice or knowledge that the funds collected on them belonged to or formed part of any trust estate, or were other than Clagett's own individual property. As a consequence we are restricted to the checks alone in determining whether the bank is liable.

It is true, undoubtedly, that a bank is bound to honor the checks of its customer, so long as he has funds on deposit to his credit, unless such funds are intercepted by a garnishment or other like process, or are held under the bank's right of set-off. It is equally true that whenever money is placed in bank on deposit and the bank's officers are unaware that the fund does not belong to the person depositing it, the bank, upon paying the fund out on the depositor's check, will be free from liability even though it should afterwards turn out that the fund in reality belonged to someone else than the individual who deposited it. It is immaterial, so far as respects the duty of the bank to the depositor, in what capacity the depositor holds or possesses the fund which he places on deposit. The obligation of the bank is simply to keep the fund safely and to return it to the proper person, or to pay it to his order. If it be deposited by one as trustee, the depositor, as trustee, has the right to withdraw it, and the bank, in the absence of knowledge or notice to the contrary, would be bound to assume that the trustee would appropriate the money, when drawn, to a proper use. Any other rule would throw upon a bank the duty of inquiring as to the appropriation made of every fund deposited by a trustee or other like fiduciary; and the imposition of such a duty would practically put an end to the banking business, because no bank could possibly conduct business if, without fault on its part, it were held accountable for the misconduct or malversations of its depositors who occupy some fiduciary relation to the fund placed by them with the bank. In the absence of notice or knowledge a bank cannot question the right of its customer to withdraw funds, nor refuse (except in the instances already noted) to honor his demands by check; and, therefore, even though the deposit be to the customer's credit in trust, the bank is under no obligation to look after the appropriation of the trust funds when with-

drawn, or to protect the trust by setting up a *jus tertii* against a demand. But if the bank has notice or knowledge that a breach of trust is being committed by an improper withdrawal of funds, or if it participates in the profits or fruits of the fraud, then it will be undoubtedly liable. In support of these general principles, if support they need at all, we may refer to *Munnerlyn* v. *Augusta Sav. Bank*, 88 Ga. 333; *State Nat. Bank* v. *Reilly*, 124 Ill. 464; *Essex County Chosen Freeholders* v. *Newark City Nat. Bank*, 48 N. J. Eq. 51, all cited in 3 Am. & Eng. Enc. Law, 2d ed. pp. 833, 834; *Walker* v. *Manhattan Bank*, 25 Fed. Rep. 255; 1 Morse, Banks & Banking, § 317; *Swift* v. *Williams*, 68 Md. 237.

As the bank, then, would not be responsible for the use made of the trust funds by the trustee unless it knowingly participated in a breach of trust or profited by the fraud, do the checks, as we have said, the only evidence in the record on this branch of the case, show that the bank is liable? As respects the first check representing the proceeds of the foreclosure of the Beall mortgage, we are of opinion that there is no liability on the part of the bank. It will be remembered that this particular check was not made payable to Clagett, *as trustee*, nor, being payable to Scott, cashier, were the proceeds directed to be placed to the credit of Clagett, *trustee*. In placing the proceeds to the individual credit of Clagett, the bank did just precisely the thing it was directed on the face of the check to do. In doing this, it violated no duty to anyone, unless the addition of the words "being the balance of purchase money due him as trustee from John R. Coale," controlled the explicit direction in the body of the check to deposit the fund to the credit of Clagett individually, and gave the bank notice that instead of doing what the check required should be done, it must do something it was not instructed to do at all, *viz.*: place the funds to the credit of Clagett, as trustee. Mr. Stanley's check was drawn, not on the National Mechanics' Bank, but upon the Citizens' National Bank of Laurel; and the memorandum descriptive of what the funds were or the source from whence they came was neither an instruction to the Mechanics' Bank, through which the check passed, as to the account in which these funds, when collected from the Citizens' Bank should be credited in the Mechanics' Bank, to Clagett: nor was it a notification to the Mechanics' Bank that the funds were impressed with a trust that would be invaded by their being carried to Clagett's individual credit. On the contrary, the specific instruction on the face of the check was to credit Clagett individually with the proceeds, whatever the origin or ultimate use of these proceeds might be. This memorandum imposed no duty on the Mechanics' Bank, and operated only to subserve the convenience of the drawer of the check. In the case of *State Nat. Bank* v. *Dodge*, 124 U. S. 333, 31 L. ed. 458, it appeared that the clerk of the United States district court for the southern district of Illinois deposited with the State National Bank the funds belonging to the registry of the court. Whenever a deposit was made it was accompanied by a deposit ticket, giving the number of the bankruptcy case to which the fund belonged, and a corresponding entry was made upon the books of the bank indicating that a particular deposit belonged to a particular case designated by its number. All this was fully understood by the officers of the bank. When checks signed by the clerk and countersigned by the judge were drawn upon this account, the number of the case to which the fund to be paid on the check belonged was written on the upper right-hand corner of the check, following the words "Case No." Numerous deposits were made in many cases, but each and every deposit showed the number of the case, and consequently identified the case to which each deposit actually belonged. Many checks were drawn upon and paid by the bank in cases in which no deposits had been made by the clerk at all and the checks themselves showed by the case numbers written on the top right-hand corners that no deposit belonging to those cases had ever been received, because there were no deposits credited to the cases bearing those numbers. In consequence of the bank having paid various checks bearing case numbers to the credit of which cases no deposits had ever been made, the entire sum of the credit of the whole account was checked out before Dodge, to whom several checks were given in the distribution of the assets of a particular estate, received his checks and presented them to the bank for payment. In the case in which Dodge was interested as a creditor of a bankrupt, there had been deposited, as shown by the deposit tickets and by the entry of the case number on the bank's books, more than sufficient to pay the checks held by Dodge, as well as all other checks delivered to other creditors of the same bankrupt; but because the bank had paid out the funds belonging to this case, on checks bearing the numbers of other and different cases, as to which latter cases there had been no deposits made at all, there were no funds in bank to the credit of the registry with which to pay the checks held by Dodge, and the bank refused to pay them. Dodge brought suit against the bank, and bases his claim to recover on the distinct ground that the bank had actual notice from its own books as to what estates had funds on deposit, and had actual notice on the face of every check drawn in a case from which no funds had been received, that there were no funds on deposit applicable to the payment of such checks, and that, consequently, when it paid those checks it paid them knowingly out of the funds belonging to other and different cases or estates, and was bound to honor the checks held by Dodge, as they were drawn against funds which had been actually deposited as part of the assets of the bankrupt estate of which he was creditor. But the supreme court held that, "no bank is bound to take notice of memoranda and figures upon the margin of a check, which a depositor places there merely for his own convenience, to preserve information for his own benefit; and in such case, the memoranda and figures are not a notice to the bank that the particular check is to be paid only from a particular fund. So, too a mark on a deposit ticket, if intended to require a particular deposit to be kept separate from all other depos-

its placed to the credit of the same depositor, must be in the shape of a plain direction, if such a duty is to be imposed on the bank." The court likewise held that "the bank had a right to assume that these memoranda of numbers in the deposits and in the checks were merely for the convenience of the court and its officers." Dodge was accordingly denied a recovery.

Unless we give to the memorandum made by Mr. Stanley for his own convenience on the first check, an effect which the supreme court declined to give to a much more significant memorandum contained in the checks delivered to Dodge, we must hold that the Mechanics Bank, by carrying to the personal credit of Clagett, the proceeds of the check representing the avails of the Beall foreclosure did no act that made it liable to the Bowling trust estate for the misappropriation of those particular proceeds by the deposed trustee. And this is so because the memorandum could not operate to qualify the right of Clagett to receive the funds individually and the bank did no wrong in placing them to his credit in the capacity in which he was obviously authorized to receive them. The bank having, therefore, rightfully entered the proceeds of the first check to Clagett's individual credit, he was entitled to draw them out so far as the bank was concerned, and the bank was under no obligation and had no authority to interfere with him in doing so.

Precisely for the reasons that the bank is not responsible for the misappropriation of the proceeds of the first check, it is liable to the new trustees for the misapplication by Clagett of the fund collected by it on the second check. The second, or Duckett check, in terms directed the cashier of the Mechanics Bank "to deposit" the $2,024.30 "to the credit of Henry W. Clagett, 'trustee.'" This was an explicit notification to the bank that Clagett was not the actual owner of the money. *Bundy* v. *Monticello*, 84 Ind. 119; 3 Am. & Eng. Enc. Law, 2d ed. p. 832. It was an equally explicit instruction to the bank not to place the funds to the credit of Clagett's personal account. It was consequently more than a mere memorandum made for the convenience of the drawer of the check. Knowing that the money was not Clagett's, but that it was payable to him, and to be deposited to his credit as trustee, the bank had no authority to place it to his individual credit (*American Exch. Nat. Bank* v. *Loretta Gold & S. Min. Co.* 165 Ill. 109); and if loss ensued by reason of Clagett drawing the fund out by checks on his personal account, the bank is liable to make restitution to the trust estate. The bank in the eye of the law participated in the breach of trust of which Clagett was guilty. In fact, the bank took the first step that ended in the spoliation of the trust. Its act in placing distinctly marked trust funds to the personal credit of Clagett was obviously wrongful, and it must bear the resulting consequences. It is no answer to say that had the bank obeyed the direction given to it, and had it opened an account in the name of Clagett as trustee, and credited that account with these funds, still Clagett could have withdrawn them on checks appropriately signed, and could then have misapplied the money without involving the bank in any liability. This is no answer, simply because what might have been done was not done. Had the bank opened the account for this fund in the name of Clagett, trustee, instead of entering the credit to his personal account, it would have done what it was its plain duty to do, and it would not have been guilty of the error which it did commit. Had it done its duty, and had Clagett afterwards withdrawn the money, as he might have done, and had he then misapplied it without the cooperation of the bank, there would have been no liability incurred by the bank at all. But this was not done, and the failure of the bank to do what it ought to have done cannot be treated as tantamount to the thing that it did do unless contraries are equivalent of each other. What it ought to have done is not what it did do, and it cannot escape liability upon the mere conjecture that what did happen to the funds might have also happened had the bank not been derelict in its dealings with those funds.

It has, however, been insisted that Clagett, knowing that the bank had wrongfully placed trust funds to his individual credit, ratified that wrongful act by his subsequent conduct, and as his ratification was equivalent to a prior direction to do what was done, the bank is not answerable. Both Clagett and the bank participated in the wrong with respect to the proceeds of the Duckett mortgage. Because they both did wrong they are both accountable for it. But the contention is, if one of two wrongdoers who reaps the fruits of the joint wrongful acts ratifies what his accomplice has done, that accomplice is thereby released and exculpated. This, of course, is not the bald form in which the rather ingenious argument advanced to support the contention is presented; but, reduced to its last analysis, it comes to that startling proposition. The wrong was done, not to the trustee, but to the trust estate. As between the bank and the trustee, his ratification of its act might bind him; but upon what principle can such a ratification bind the beneficiaries of the trust, who have been injured by the joint breach of trust on the part of the bank and the trustee? No ratification by the trustee of the bank's participation in the breach of trust can possibly affect in any way the bank's accountability to the new trustees.

As to the statute of limitations it is only necessary to say that a participant in a breach of trust cannot, any more than can the trustee himself, invoke that defense. 2 Pom. Eq. Jur. § 1080. Even if the statute applied, to be availed of as a defense it must be invoked by either as a plea or an answer. *Allender* v. *Trinity Church*, 3 Gill, 166. The answer of the bank relies on limitations only as against the claim for $2,000, which is not the claim for $2,024.30 collected on the check given in payment of the Duckett mortgage debt—and that is the claim for which we hold the bank liable. So in fact the statute is pleaded against the claim that the bank is not liable for and is not pleaded against the claim for which it is responsible.

We have made no allusion to a line of cases of which *Third Nat. Bank* v. *Lange*, 51 Md. 138, 34 Am. Rep. 304; *Marbury* v. *Ehlen*, 72

Md. 206, and *Stewart* v. *Firemen's Ins. Co.* 53 Md. 564, are illustrations; because the principles applied in that group of decisions have no relation to the questions involved in the record now before us. The sale of a promissory note payable to a trustee—and therefore a non-negotiable note—or the transfer of a certificate of stock, standing in the name of an individual as trustee, is quite a different thing from the payment of a check drawn by a trustee, on an account standing to his credit as trustee in a bank. Where certicates of stocks are held in trust, and on their face indicate that they are so held, the bank or other corporation, is bound before suffering them to be transferred on the books of the corporation, to know, or at least to use proper diligence to ascertain, that the trustee has authority to make the transfer; whereas in the case of a deposit the relation of debtor and creditor is created in the capacity in which the deposit is made, and the bank's duty is to pay out the fund to or upon the order of the person making the deposit when the check is properly signed, without looking to the application of the fund; and it incurs no responsibility by so doing unless it knowingly participates in a breach of trust or itself reaps the fruit thereof.

We hold, then, on the entire case, that the bank is accountable for the sum of $2,024.30 —the amount of the check dated September 17, 1892, with interest thereon from the date of the deposit of the proceeds to the credit of Clagett's individual account, and that it is not liable for the proceeds of the other check.

The decree dismissing the bill of complaint will accordingly be reversed, and the cause will be remanded that a new decree may be passed conforming to this opinion.

Decree reversed with costs above and below, and cause remanded.

KANSAS SUPREME COURT.

TOPEKA WATER COMPANY, *Plff. in Err.*,
v.
Kate J. WHITING.

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

*1. **The fact that a municipality confers upon a water company the right to place its hydrants in the streets,** and to open them for the purpose of flushing its mains, gives the company no license or right to flush at such times and in such a manner as to unnecessarily impede travel or imperil the safety of those passing and repassing over the street.

2. **The license to flush** carried with it the obligation to do so with reasonable care and a due regard for the rights of others.

3. **The testimony examined,** and *held*, that it tends to show that an open hydrant, from which water was thrown about 10 feet into the street, with considerable noise and spray, is calculated to frighten ordinarily gentle horses.

4. **In view of this fact it was the duty** of the water company to adopt such precautions and exercise such care in flushing its mains as an ordinarily discreet and prudent person would adopt and exercise under like circumstances for the protection and safety of those traveling upon the street.

5. **Ordinarily, it is a question of fact** in each case whether the precautions taken and the care exercised are sufficient to warn and protect travelers who are using ordinary care.

6. **Persons using a street which is in constant use,** and when their attention has not been called to any obstructions or perils thereon, have a right to presume that the street is reasonably safe for ordinary travel. While they must act with reasonable care, they are not required to keep their eyes upon the pavement continuously, watching for obstructions or pitfalls.

7. **Upon examination of the testimony** it is *held*, that the question whether the plaintiff below was in the exercise of due care when her horse was frightened, and the injury inflicted, was fairly a question for the jury, and the finding in her favor upon the question is conclusive.

(November 6, 1897.)

*Headnotes by JOHNSTON, J.

NOTE.—As to the liability for injuries caused by horses becoming frightened on a highway, see Bowes v. Boston (Mass.) 15 L. R. A. 365, and *note*; also Kieffer v. Hummelstown (Pa.) 17 L. R. A. 217. 39 L. R. A.

See also 47 L. R. A. 752.

ERROR to the District Court for Shawnee County to review a judgment in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Affirmed.*

The facts are stated in the opinion.

Messrs. **D. W. Mulvane** and **N. H. Loomis,** for plaintiff in error:

There was no negligence upon the part of defendant, and its demurrer to the evidence should have been sustained, and its request for an instruction in its favor should have been granted.

Morton v. *Frankfort*, 55 Me. 46; *Macomber* v. *Nichols*, 34 Mich. 212, 22 Am. Rep. 522; *Cowan* v. *Muskegon R. Co.* 84 Mich. 583; *Sinclair* v. *Baltimore*, 59 Md. 592; *Welsh* v. *Wilson*, 101 N. Y. 254, 54 Am. Rep. 698; *Dubois* v. *Kingston*, 102 N. Y. 219, 55 Am. Rep. 804; *Agnew* v. *Corunna*, 55 Mich. 431, 54 Am. Rep. 338; *Loberg* v. *Amherst*, 87 Wis. 634; *O'Rourke* v. *Monroe*, 98 Mich. 520.

The plaintiff and her sister, who was driving, were both chargeable with contributory negligence.

Robb v. *Connellsville*, 137 Pa. 42; *Barnes* v. *Sowden*, 119 Pa. 53; *King* v. *Thompson*, 87 Pa. 365, 30 Am. Rep. 364; *Dubois* v. *Kingston*, 102 N. Y. 219, 55 Am. Rep. 804; *Butterfield* v. *Forrester*, 11 East, 60; *Barker* v. *Savage*, 45 N.

Y. 191, 6 Am. Rep. 66; *Plymouth* v. *Milner*, 117 Ind. 324; *Evans* v. *Adams Exp. Co.* 122 Ind. 362, 7 L. R. A. 678.

The court erred in instructing the jury that if plaintiff was chargeable with only slight negligence, and the defendant with gross negligence, a recovery could be had.

Kansas P. R. Co. v. *Peavey*, 29 Kan. 169, 44 Am. Rep. 630; *Chicago, K. & W. R. Co.* v. *O'Connell*, 46 Kan. 581; *Atchison, T. & S. F. R. Co.* v. *Wells*, 56 Kan. 222; *Atchison, T. & S. F. R. Co.* v. *Winston*, 56 Kan. 456; *Atchison, T. & S. F. R. Co.* v. *Hague*, 54 Kan. 284.

Messrs. **Waters & Waters, E. F. Hilton,** and **A. W. Dana,** for defendant in error:

Even upon its own premises, the defendant would have been bound, in the flushing of its hydrant, to a due regard to the rights of others.

Central Branch Union P. R. Co. v. *Henigh*, 23 Kan. 358, 33 Am. Rep. 167; *Kansas C. R. Co.* v. *Fitzsimmons*, 22 Kan. 691, 31 Am. Rep. 203; *Culp* v. *Atchison & N. R. Co.* 17 Kan. 477.

And if of necessity, in flushing it, defendant had to use a portion of the highway, it was still bound to take such precautions as should prevent injury to the traveler using ordinary care.

2 Shearm. & Redf. Neg. §§ 342, 361; Ray, Negligence of Imposed Duties, 247.

No use of a public highway can be allowed except its use for travel and transportation.

Mikesell v. *Durkee*, 34 Kan. 509; *Smith* v. *Leavenworth*, 15 Kan. 81.

Negligence is not imputable to a person for failing to look for a danger when, under the surrounding circumstances, the person sought to be charged with it had no reason to suspect that danger was to be apprehended.

Brown v. *Atchison, T. & S. F. R. Co.* 31 Kan. 1; *Moulton* v. *Aldrich*, 28 Kan. 300; *Central Branch Union P. R. Co.* v. *Henigh*, 23 Kan. 358, 33 Am. Rep. 167; *Langan* v. *St. Louis, I. M. & S. R. Co.* 72 Mo. 392; *Gray* v. *Scott*, 66 Pa. 345, 5 Am. Rep. 371; *Fowler* v. *Baltimore & O. R. Co.* 18 W. Va. 579; *Dush* v. *Fitzhugh*, 2 Lea, 307; *Freer* v. *Cameron*, 4 Rich. L. 228, 55 Am. Dec. 672, and note; Beach, Contrib. Neg. 38, 39; Deering, Neg. 16; 2 Shearm. & Redf. Neg. 4th ed. § 90; 4 Am. & Eng. Enc. Law, pp. 34, 35, and note.

Even though these parties had not become educated into a belief as to the safety of the highway, through an experience that left no suspicion of danger, they still had a right, from the very fact of its being a public highway, to presume it to be safe, and to regulate their conduct upon such presumption.

McGuire v. *Spence*, 91 N. Y. 303, 43 Am. Rep. 668; *Wells* v. *Sibley*, 31 N. Y. S. R. 40; *Barry* v. *Terkildsen*, 72 Cal. 256; *Jennings* v. *Van Schaick*, 108 N. Y. 530; *Thompson* v. *Bridgewater*, 7 Pick. 189; *Gordon* v. *Richmond*, 83 Va. 438; *Davenport* v. *Ruckman*, 37 N. Y. 573; *Howard County Comrs.* v. *Legg*, 110 Ind. 483; *Koch* v. *Edgewater*, 14 Hun, 544; *Indianapolis* v. *Gaston*, 58 Ind. 225; *Pennsylvania Canal Co.* v. *Bentley*, 66 Pa. 33; *Smith* v. *Sherwood Twp.* 62 Mich. 159; *Brown* v. *Atchison, T. & S. F. R. Co.* 31 Kan. 1.

If gentle or ordinarily well-broken horses would naturally frighten at an unattended hydrant under full flow, the defendant, as matter of law, is charged with the duty of operating it with such reasonable care that horses will not frighten. If the defendant had no license to operate the hydrant in the street it was a nuisance and an illegal obstruction, and it was negligence to operate it at all.

Yates v. *Warrenton*, 84 Va. 337; *Cohen* v. *New York*, 113 N. Y. 532, 4 L. R. A. 406; *Clifford* v. *Dam*, 81 N. Y. 52.

If defendant had a license it was a license only to operate it in an ordinarily careful way, and the negligent operation of it cannot be justified by its license.

Bordentown & S. A. Turnp. Road v. *Camden & A. R. & Transp. Co.* 17 N. J. L. 314; *Moshier* v. *Utica & S. R. Co.* 8 Barb. 427.

There is not an element lacking to make plaintiffs conduct that of ordinary care as the jury found.

Salina v. *Trosper*, 27 Kan. 562.

In a legalized obstruction the thing must be done in a reasonably careful way and not in a negligent way.

Russell v. *Columbia*, 74 Mo. 480, 41 Am. Rep. 325; *Indianapolis* v. *Doherty*, 71 Ind. 5.

Plaintiff was not bound to look out for an obstruction that she did not know existed, and could not reasonably anticipate.

Moulton v. *Aldrich*, 28 Kan. 300; *Davenport* v. *Ruckman*, 37 N. Y. 568; *Barry* v. *Terkildsen*, 72 Cal. 244; *Kelly* v. *Blackstone*, 147 Mass. 448; *Indianapolis* v. *Gaston*, 58 Ind. 224; *Howard County Comrs.* v. *Legg*, 110 Ind. 479; *McGuire* v. *Spence*, 91 N. Y. 303, 43 Am. Rep. 668.

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

Near the noon hour on December 21, 1891, Kate J. Whiting, accompanied by her mother and sister, was driving upon one of the streets of Topeka, when their horse became frightened at the water spurting or flowing from an open hydrant in the street, and turned around suddenly, capsizing the buggy, and breaking Kate J. Whiting's arm, and otherwise seriously injuring her. The hydrant, which was upon a dead end of a main, was opened by an employee of the Topeka Water Company for the purpose of flushing the main, and relieving it of the stagnant and impure water therein. The plaintiff below alleged, and it is her contention, that the water company was culpably negligent in doing the flushing at the time when and in the manner in which it was done, and in failing to take due care for the protection and safety of those who were then passing along the street. The company, on the other hand, claims that, as the right to place hydrants upon the streets had been conferred on it, it was rightfully upon the street; that the flushing of the main at that point was necessary; and that it was done in the usual and ordinary way, and at a proper time. There was a further contention in favor of the company that the plaintiff below was negligent in failing to earlier observe the open hydrant, so that she could take greater care in controlling the horse, and avoiding accident or injury. It appears that the flow from the hydrant extended into the street for about 10 feet, and could have been seen by the Whitings, if their attention had been directed to it, for a distance of about 500 feet. Grace Whiting was driving

the horse, and neither she nor the plaintiff below noticed the flowing hydrant until they were within 100 feet of the same, and just at that time and place the horse discovered it, took fright, and overturned the buggy. The trial resulted in a verdict in favor of the plaintiff below in the sum of $5,000, and the principal contention of the company is that the testimony was insufficient to support the verdict, or to show culpable negligence on the part of the company.

That the company had the right to place its hydrants in the streets, and to flush them, is conceded; but it had no license or right to flush them at such a time, or in such a manner, as to impede travel, or imperil the safety of those passing and repassing over the street. The license to flush carried with it the obligation to do so with reasonable care, and a due regard for the rights of others. The primary purpose of streets is use by the public for travel and transportation, and, if the water company unnecessarily interferes with that use, or negligently flushes its mains, thereby causing injury to others, it is liable for the consequences of such negligence. The testimony abundantly shows that an open, flowing hydrant is calculated to frighten horses of ordinary gentleness. Some of the witnesses said that the flowing water made a roaring noise; others, that it came with a great splash; while others said that there was a great deal of spray and froth. Experienced horsemen testified that gentle and well-broken horses were apt to be frightened at such objects; and it appears that, while the hydrant in question was only open for a few minutes, three driving horses were actually frightened by it. Whether an object is such as is calculated to frighten a gentle and roadworthy horse is usually a question of fact for the jury to determine. On these questions the findings of the jury are in favor of the defendant in error. The horse was gentle, the driver was experienced in handling horses, and the jury find that the manner in which the flushing was done had a peculiar tendency to frighten ordinarily gentle and well-broken horses. The water company was aware of this tendency, as the jury have found, and yet no precautions were taken to warn passers-by of the impending danger, or to protect them from injury. The employee who opened the hydrant was from 100 to 150 feet distant from the same when the horse took fright, and from his testimony it is evident that he was not endeavoring to warn or protect those passing along the street. It is said that the method of flushing in this instance was the usual and ordinary one which had been pursued, but this will not avail the company, as it cannot be sheltered from liability by frequent trespasses upon the rights of others, nor by the long continuance of negligent methods. What precautions should have been taken, and what degree of care should have been exercised? It is generally said that there should be that care and prudence which an ordinarily discreet and careful person would exercise under like circumstances. The protection and care which it is necessary to use in cases of this kind must be determined by the character of the risk and the nature of the threatened injury. It is claimed that the hydrants might have been opened in the night-time, when few, if any, persons would be passing along the street; and it appears that sometimes the flushing was done at night. It also claimed that employees might have been stationed at the open hydrant to shut off the water on the approach of frightened horses, or one stationed on either side of it to warn travelers of the danger. A flag signal or other object of warning might have been placed on either side of the hydrant to call the attention of travelers to the open hydrant, and thus enable them to better control their horses, or to turn aside, and pass over another street. Still another method is suggested, which appears to be quite practicable, and that is, to conduct the water from the hydrant through a suitable hose. Just what method should have been employed, and what precautions should have been taken, we need not determine; but certainly they should be sufficient to accomplish the purpose. It is a question of fact in each case whether the precautions taken and the care exercised are sufficient to warn or protect travelers who are using ordinary care; and, under the testimony and findings of the jury, it must be held that the company failed to use that care which the law required of them.

We are not favorably impressed with the contention that the plaintiff below and her sister, Grace, were guilty of contributory negligence. It appears that they were riding in a single-seated buggy, and that Grace, who was seated between her mother and the plaintiff below, was driving. They were talking about Christmas presents, which they were intending to purchase. The plaintiff below and her mother were not giving special attention to the street, or keeping a lookout for obstructions. Grace, however, was giving ordinary attention, and, as the jury have found, was exercising reasonable care. Although they had driven into and through the street frequently, they had never seen an open, flowing hydrant, and were not anticipating any danger from that source. It is true that the open hydrant was within range of their vision if their attention had been called to it, and it was discernible before it was discovered by them. They were not, however, required to keep their eyes upon the pavement continuously looking for obstructions and pitfalls. It was a street which was in constant use, and over which they had passed almost daily without encountering such a danger. While they must still act with reasonable care, they had a right to presume, and to act on the presumption, that the street was reasonably safe for ordinary travel. They were not required to use the wisest precautions nor extraordinary care, but only such as persons of common prudence ordinarily exercise under similar circumstances. Grace did discover the danger when within about 100 feet of it, and it appears from the testimony that others whose horses were frightened did not observe the danger until they were quite close to it. Under these circumstances it certainly cannot be said, as a matter of law, that the plaintiff in error was guilty of contributory negligence. Whether she and her sister were in the exercise of ordinary care was fairly a question for the jury, and their finding in her favor is conclusive.

Complaint is made because the court, in its charge, remarked that slight negligence should not necessarily defeat a recovery by the plaintiff if the company was guilty of gross negligence. It is claimed that there was no averment or testimony which warranted the allusion to gross negligence. There is but little in the testimony tending to show gross negligence, but, as we have seen, the method used for flushing was calculated to frighten even gentle horses. The hydrant was opened in the daytime, when many persons were passing along the street. The jury found that the company was aware that the flowing hydrant had a tendency to frighten ordinarily gentle and well-broken horses, and yet, with this knowledge, it pursued the negligent method. Under the circumstances, we think the degree of negligence was a matter for the determination of the jury, and we cannot say that prejudicial error was committed by reference to gross negligence. When the trial court came closer to the facts in the case, he instructed that the company was required to exercise ordinary care, and also that the plaintiff below was held to the exercise of the same degree of care, and the jury have practically found that she exercised ordinary care. There are some other criticisms of the charge of the court, and also of its rulings upon the testimony and findings, but we find nothing substantial in them.

The judgment of the District Court will therefore be affirmed.

All the Justices concur.

KENTUCKY COURT OF APPEALS.

City of MAYSVILLE, *Appt.*,
v.
George T. WOOD *et al.*

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

A municipal corporation cannot hold the title as trustee on a dedication of land for a church lot or for religious purposes.

(November 19, 1897.)

APPEAL by complainant from a decree of the Circuit Court for Mason County refusing to declare void a judicial sale of certain property and to enjoin defendants from interfering therewith. *Affirmed.*

The facts are stated in the opinion.

Messrs. **J. N. Kehoe** and **W. H. Wadsworth** for appellant.

Mr. **E. L. Worthington,** for appellees:

The state or any subdivision thereof may hold title to land in trust for such charitable purposes as are germane to the objects of its creation, such as for schools, poorhouses, hospitals.

The one thing under our system of government that the state and its subdivisions must keep their hands off of is religion.

Const. § 5.

A grant, whether by deed, devise, or dedication to a municipal corporation in trust for religious purposes, is void, in so far as the title is attempted to be vested in the municipality.

2 Dill. Mun. Corp. § 573; *Jackson, Lynch,* v. *Hartwell,* 8 Johns. 422; *Franklin's Estate,* 150 Pa. 437.

Property may be effectually dedicated without the legal title to it being transferred to anybody, or any corporation. In such a case it remains in the dedicator and his heirs, in trust for the particular portion of the public for whose use the dedication was made; and they are the proper parties to sue for any diversion of the dedicated property to other purposes.

Baptist Church v. *Presbyterian Church,* 18 B. Mon. 641.

White, J., delivered the opinion of the court.

This action was begun in the circuit court of Mason county by the appellant, the city of Maysville, against the appellees, George T. Wood and others, by which the appellant sought to have a sale by the court's commissioner, made under an *ex parte* proceeding on behalf of appellees, Woods and others, declared void, and a nullity, and to enjoin said appellees from in any way interfering with a certain lot of ground in the said city of Maysville, and also sought to perpetuate said ground for the purposes for which same had been dedicated years before. The petition states that in the year 1818 one Samuel January owned the land in that part of the city of Maysville, and laid same off into streets and alleys and lots, and sold lots according to said plat, and had same recorded. The place was then called "Limestone," but was not an incorporated town. On this plat there is a lot of ground—the land here in contest—marked "Meeting House Square." This ground was never sold, and has never been built upon. Some time after the year 1818 the said town of Limestone was incorporated as East Maysville, and in 1853 the trustees of said town of East Maysville by a regular deed of conveyance executed and acknowledged, deeded or undertook to convey to Shackelford, Anderson, and Spencer, as trustees for the Christian or Reform Baptist Church, and to their successors in office, this said ground known as "Meeting House Square," providing that said trustees should take possession of same and inclose and improve same in conformity to the true spirit and intention of the original donor; the said deed reciting that, as the said Samuel January and his wife and eight out of their nine children were or had been members of the Christian or Reform Baptist Church,

NOTE.—For municipal corporation as trustee of charity, see also Dailey v. New Haven (Conn.) 14 L. R. A. 69, and *note.*

his charity—this lot—should be occupied by the church of which he and family were members. This deed was duly recorded in the clerk's office of Mason County. The petition also alleges that afterwards the said town of East Maysville became a part of the city of Maysville, and was such part at the filing of said petition. The petition states that at the September term, 1891, the appellees Woods, Williams, and Hall, acting as trustees of the religious denomination known as the "Maysville Christian Church," by an *ex parte* proceeding sought and obtained a decree of the circuit court of Mason county directing a sale of this lot known as "Meeting-House Square," and that under said decree the same was sold, and was bought by appellees Kackley and Trexel; that on the day of sale the said purchasers were notified of the fact that this appellant objected to the sale, and would contest the title of the purchaser; and that, on the report of sale being filed in said *ex parte* proceeding, this appellant appeared, and offered to file exceptions to the confirmation of the sale, but the court refused to permit same to be filed; and that appellant now brings this suit and asks that said sale be declared void, and that said lot of land be declared a dedication from said Samuel January to the use of the public to be used for the sole and only purpose of erecting thereon a house or houses of religious worship, which the petition alleges was the object and intention of said donor. The circuit court sustained a demurrer to this petition, and appellant, by leave, amended, and in the amendment the only change made is that it is alleged that said lot of land was by the said Samual January dedicated to the public for use as a place of public resort or meetings of any and all legal character, and that the appellant had expended large sums of money on the streets adjacent to said property in grading and beautifying same. To this amendment, and the petition as amended, the court sustained a demurrer, and, appellant declining to plead further, the petition was dismissed, and from that action of the court this appeal is prosecuted.

The sole question to be determined on this appeal is, Did the petition of appellant, or the same as amended, present a cause of action in appellant? If that question be determined in the affirmative, the judgment of the circuit court should be reversed. In the amended petition filed the only change made from the original is the allegation that the city of Maysville had improved the streets around this "Meeting-House Square," and the allegation that in the dedication made by Samuel January the said doner intended "that said dedication was made for public meeting purposes generally, and intended as a place of public resort, where the public generally had a right to and could meet and transact any and all matters affecting the public generally." This amendment only states the conclusion of the pleader as to the intention of the doner, as he therein pleads the dedication by the express words of the plat, and makes same a part thereof. It seems to us that this conclusion is not warranted by the plat, which is the only evidence of the dedication. On this plat there are three squares set apart called respectively "Public Square," "Seminary Square," and "Meeting-House Square," The two latter are situated adjacent, with an alley only between. The public square was some squares away, and in seems to us that the only meaning that could be attached to the words "Meeting-House Square" is that given to same in the original petition; *i. e.*, "for religious purposes and with a view of making it a place of religious instruction and worship." Now, this being the true meaning and intention of the donor in making the dedication, can the appellant, the city of Maysville, maintain this action? The question is not whether a lot may be dedicated for a church lot or for religious purposes—for it is now well settled that it can,—but whether a lot dedicated for religious or church purposes can be under the control of the municipal government, or whether the municipality can hold the title as trustee for the public so as to maintain an action for its preservation. In 2 Dill. Mun. Corp. § 573, the principle is stated, thus: "Municipal corporations cannot, for the same reasons applicable to ordinary corporations aggregate, hold lands in trust for any object or matter foreign to the purpose for which they are created, and in which they have no interest." To this principle we assent, and hold that municipal corporations cannot hold land in trust for religious purposes. It is clear that since the establishment of this government it has always been the intention of its citizens to entirely separate church and state. In all our constitutions such an intention is clearly expressed, and in the legal light of this history it is manifest that at no time was any municipal corporation ever organized in this state with any power or authority in matters affecting religious worship. We have said that land may be dedicated for church or religious purposes, but in no event can this dedication be to a municipal corporation as trustee. The duty of the corporation in regard to church property or religious worship is to guarantee the citizen his property or religious rights, and the free enjoyment of same. As the appellant, the city of Maysville, has no right of property in the lot in question,—all of which appears from the petition,—we are of opinion that the court did not err in sustaining the demurrers, and in dismissing the action, and the same is *affirmed*.

GEORGIA SUPREME COURT.

Sadie J. LUTHER, *Plff. in Err.*,
v.
J. N. CLAY, Exr., etc., of Polly McWilliams.

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

*1. **Where, in the trial of a litigated case, a party procured from the presiding judge** a ruling or decision that a given judgment was valid and legal, and, as a result, that case was adjudicated in favor of such party, he was, in subsequent litigation with the same adverse party, estopped from denying the validity or legality of the judgment in question.

2. **Where a plaintiff had obtained a judgment, and, after the death of himself and his sole heir,** an execution was issued in favor of the latter's legal representative, it was not, at the instance of a claimant of property levied on under such execution, a good ground of objection to its admissibility in evidence on the trial of the claim case that an order directing such execution to issue had been granted without service upon or notice to the defendant in the judgment.

3. **An agreed statement of facts, upon which a case was tried** by a judge without a jury, though not thereafter absolutely binding and conclusive upon the parties thereto in a jury trial of another case between them involving the same issues, was, in such trial, admissible in evidence at the instance of one against the other, subject to the latter's right to disprove, rebut, or explain any statement therein contained.

4. **The rights of a mortgagee, who merely handed the mortgage to the mortgagor at his request,** and for the purpose of inspection only, are in no way affected by the latter's secretly and fraudulently substituting in its place a copy thereof, abstracting the original, and forging upon it an entry of satisfaction, by means of which he procured the record of the mortgage to be canceled; it not appearing that the mortgagee, other than as above stated, reposed any trust or confidence in the mortgagor, or delegated to him the performance of any duty with respect to the mortgage, or had any reason to suspect the fraudulent design, or was negligent in not detecting the fraud at the time of its perpetration or thereafter. In such case, even a bona fide purchaser of the mortgaged premises, though he bought in the honest belief that the mortgage had been actually satisfied, took, nevertheless, subject to its lien.

(February 22, 1897.)

ERROR to the Superior Court of Fulton County to review a judgment overruling the claim of plaintiff in error to land upon which an execution had been levied to satisfy a judgment for the foreclosure of a mortgage which had been executed by R. H. Knapp to Robert McWilliams and the right to enforce which had finally vested in plaintiff. *Affirmed.*

The facts are stated in the opinion.

Messrs. **Candler & Thomson** for plaintiff in error.

Messrs. **Hillyer, Alexander, & Lamb-din** and **J. N. Bateman,** for defendant in error:

The claimant is estopped from attacking the judgment in this case. There having been two foreclosures of the mortgage in question, and the execution which issued on the last foreclosure having been previously levied on the property claimed in this case, and upon trial of the claim case thus made on a previous occasion the claimant having had the court to dismiss the levy on the ground that there was outstanding a former valid judgment foreclosing the same mortgage, she is now estopped from denying the validity of said former judgment.

Ga. Civ. Code, § 5150; *Davis* v. *Wakelee*, 156 U. S. 680, 39 L. ed. 578; *Michels* v. *Olmstead*, 157 U. S. 198, 39 L. ed. 671; *Smith* v. *Sutton*, 74 Ga. 531; *Alexander* v. *Sutlive*, 3 Ga. 27; *Schneitman* v. *Noble*, 75 Iowa, 120; *Knoop* v. *Kelsey*, 102 Mo. 291; *Crusselle* v. *Reinhardt*, 68 Ga. 619; *Miller* v. *Wilkins*, 79 Ga. 678.

The order of court directing execution to issue in the name of Clay, executor of Mrs. McWilliams, on the judgment rendered during the life of the original mortgagee, her husband, and in his favor (she being his sole heir and the defendant being nonresident), was valid, even though made without notice to the defendant.

Ga. Civ. Code, §§ 3355, 5030; *McElhaney* v. *Crawford*, 96 Ga. 174; *Towns* v. *Mathews*, 91 Ga. 546; *Rogers* v. *Truett*, 73 Ga. 386; *Johnson* v. *Champion*, 88 Ga. 527.

The agreed statement of facts used in evidence on the trial of a case between the same parties about the same subject-matter on a former occasion was competent evidence on the trial of this case.

Crusselle v. *Reinhardt*, 68 Ga. 619; *Anderson* v. *Clark*, 70 Ga. 362; *Cheney* v. *Selman*, 71 Ga. 384; *Miller* v. *Wilkins*, 79 Ga. 678; *Hyatt* v. *Burlington, C. R. & N. R. Co.* 68 Iowa, 662.

Neither forgery or theft can confer title even on an innocent purchaser.

Cole v. *Levi*, 44 Ga. 579; *Blaisdell* v. *Bohr*, 68 Ga. 56; Kerr, Fraud & Mistake, 315; *Atlanta Nat. Bank* v. *Burke*, 81 Ga. 597, 2 L. R. A. 96; *Bangor Electric Light & Power Co.* v. *Robinson*, 52 Fed. Rep. 520.

The principle that where one of two innocent persons must suffer by the act of a third person he must bear the loss who put it in the power of such third person to do the wrong, is not applicable in this case,—because the act of Knapp in stealing the mortgage and forging the cancelation was not the proximate result of the mortgagee's allowing him to look at the mortgage for a few moments. These acts of Knapp were not an abuse of power, but were wholly unwarranted.

King v. *Sparks*, 77 Ga. 285; *Smith* v. *South Royalton Bank*, 32 Vt. 341, 76 Am. Dec. 182; *Angle* v. *Northwestern L. Ins. Co.* 92 U. S. 330, 23 L. ed. 555; *Western U. Teleg. Co.* v. *Davenport*, 97 U. S. 369, 24 L. ed. 1047; *Wood* v. *Steele*, 73 U. S. 6 Wall. 80, 18 L. ed. 725.

No question of negligence or estoppel arose against the mortgagee on account of the way

*Headnotes by COBB, J.

NOTE.—For estoppel to deny forgery, see *note* to Traders' Nat. Bank v. Rogers (Mass.) 36 L. R. A. 539.

See also 46 L. R. A. 694.

in which the mortgagor obtained possession of the mortgage and procured its cancelation on the records.

McGinn v. *Tobey*, 62 Mich. 252; *Chandler* v. *White*, 84 Ill. 435; Bigelow, Estoppel, 5th ed. pp. 657, 658; *Meley* v. *Collins*, 41 Cal. 663, 10 Am. Rep. 279.

Registration of a forged instrument or release has no effect on the title; even an innocent purchaser takes the risk of forgeries.

Warvelle, Vendors, p. 536; *Haight* v. *Vallet*, 89 Cal. 245; *Reck* v. *Clapp*, 98 Pa. 581.

Where a release of a mortgage is a forgery, an innocent purchaser buys subject to the mortgage.

D' Wolf v. *Haydn*, 24 Ill. 525; *Lee* v. *Clark*, 89 Mo. 553; *Hagermann* v. *Sutton*, 91 Mo. 533; *Isaacs* v. *Skrainka*, 95 Mo. 521; *Smith* v. *Stark*, 3 Colo. App. 453.

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

An execution in favor of J. N. Clay, executor of the will of Polly McWilliams, deceased, issued upon the foreclosure of a mortgage executed by R. H. Knapp to Robert McWilliams, was levied upon a certain described lot in the city of Atlanta, and a claim thereto was interposed by Mrs. Sadie J. Luther. On the trial a verdict in favor of the plaintiff in execution was directed by the court. The claimant made a motion for a new trial upon various grounds, and, the same having been overruled, she filed her bill of exceptions, alleging the refusal to grant a new trial as error.

The facts, as they appear upon the trial of the case, are as follows: On January 2, 1884, R. H. Knapp executed to Robert McWilliams a mortgage on certain land in the city of Atlanta to secure the payment of a note of even date. The mortgage was duly recorded on February 25, 1884, and McWilliams took the same to his home, inclosed in an envelop, and placed "it away among his papers or archives." In March, 1887, Knapp came to the house of McWilliams, who was a very old man (being nearly eighty years of age), and asked him whether the mortgage in question had ever been recorded, and requested that he be allowed to examine it, stating that he had made inquiry or examination at the record office, and had not found it. McWilliams took from his papers the envelop containing the mortgage, and handed it to Knapp, who received it, and was proceeding to examine, to see if the entry of recording was upon it, when McWilliams left Knapp for a few minutes. When he returned, Knapp handed him the envelop, stating that it was all right; and McWilliams, supposing that the mortgage was in it, placed it again among his papers, and did not examine it until some time afterwards, when Knapp had absconded. When McWilliams heard that Knapp had left the state, he went to his papers, to get the mortgage, and in the envelop which had contained the original he found only a copy. The only opportunity for the substitution of this copy was at the time above referred to. Upon investigation, the original mortgage was found on file in the clerk's office in Atlanta, and upon it was an entry of cancelation, purporting to have been signed by McWilliams, which had been entered upon the record on the 30th day of March, 1887. The entry of concelation upon the mortgage was a forgery. Mrs. Luther purchased a part of the land described in the mortgage to McWilliams for value after the filing of the forged cancelation with the clerk, and before Knapp ran away. The purchase was made without notice of the fraud perpetrated by Knapp in obtaining possession of the mortgage and causing a forged cancelation to be filed and entered on the record, and after an examination of the record, and upon the honest belief that the cancelation was authorized and genuine. On May 2, 1887, Robert McWilliams filed his petition in the ordinary form in the supreme court of Fulton county, praying for the foreclosure of the mortgage. A rule absolute was granted on March 31, 1888. In October, 1888, Robert McWilliams filed another petition for the foreclosure of the same mortgage. The petition, in addition to the usual recitals, contained the following: "Petitioner further shows that on or about the 24th day of March, 1887, the said R. H. Knapp fraudulently got possession of said mortgage, and entered upon its face a cancelation of the same, with authority to the clerk of the superior court of said county to make the record of said mortgage satisfied and settled; the same having been entered of record in Book 1, page 493, of the Records of Mortgages in said clerk's office aforesaid. Petitioner avers that he had no knowledge of said mortgage at the time it was canceled and delivered to the clerk aforesaid, being in the hands of said R. H. Knapp; that the entry of settlement made thereon was not made or signed by petitioner, nor was it made or signed by his authority, or anyone authorized by him, and that said entry of settlement and cancelation on said mortgage is a forgery." Pending the foreclosure an order was passed reciting the death of Robert McWilliams, leaving his wife, Polly McWilliams, as his sole heir; that she had paid all of his debts; and ordering her made party plaintiff in the case. Judgment of foreclosure was entered in the usual form, reciting the death of McWilliams and the making of parties. J. N. Clay, as executor of the will of Polly McWilliams, filed his petition to the superior court of Fulton county, reciting the first foreclosure of the mortgage above referred to, and that on November 7, 1894, after the death of Robert McWilliams, the clerk, by mistake, issued an execution upon such foreclosure. It was alleged that Polly McWilliams was the sole heir of Robert McWilliams, that she paid all of his debts, and that J. H. Clay was her executor. The prayer was that the execution issued in the name of Robert McWilliams be quashed, and that a new execution in favor of Clay, as executor of Polly McWilliams, be issued in lieu thereof. Service of this petition was not made upon the defendant or any other person. On December 21, 1894, in term, an order was passed quashing the execution and granting "leave to the petitioner to sue out a fi. fa. in his name as such executor." An execution was duly issued under this order.

1. The execution issued upon the second foreclosure above referred to was levied upon

the land embraced in the mortgage, and claims thereto were filed by Mrs. Luther and other parties to different parcels of the lot. The several claim cases were submitted to the judge without the intervention of a jury. Upon the trial, claimants objected to the introduction of the second foreclosure proceedings, and the execution issued thereon, on the ground that there had been a former foreclosure, and that the plaintiff had no right to proceed under the second foreclosure until the first foreclosure had been set aside. The court sustained the objection, ruled out the evidence, and dismissed the levies. The plaintiff in fi. fa. acquiesced in this decision, which had been made against him on the motion of the claimants, and proceeded to have the execution upon the first foreclosure issued under the circumstances above recited. When this execution was levied upon the mortgaged premises, claims were again interposed by the parties who were purchasers of the property. Upon the trial of the case now under consideration, in which Mrs. Luther was the claimant, objection was made to the introduction of the first foreclosure proceeding under which the levy in question was made, on the following grounds: First, because at the time of the foreclosure the original mortgage was not in the possession of the plaintiff, but was in the hands of the clerk of the court, marked "Canceled;" second, because the judgment of foreclosure was not made at the next term after that at which the rule *nisi* issued; third, because there was no legal service upon the mortgagor, in that he was not personally served, and there was no service by publication for four months next before the term at which said judgment was rendered. Under the view we take of the case, it is not necessary for these questions to be considered. Whether they would be well taken or not, if taken advantage of at the proper time, this claimant cannot now be heard to attack the regularity or validity of the first foreclosure. When this levy was made under the second foreclosure, it was upon motion of her counsel that such levy was held to be illegal, and dismissed. Having invoked a ruling from the court that the first foreclosure was valid, and this decision having been acquiesced in and acted upon by the party against whom it was made, she cannot be heard to attack the judgment which she obtained, and of which she took the benefit, although it may have been an erroneous one. In the case of *Davis* v. *Wakelee*, 156 U. S. 689, 39 L. ed. 584, where a question similar to the one under consideration was before the court, Mr. Justice Brown, in the opinion, says: "It may be laid down as a general proposition that, where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him." In the case of *Philadelphia, W. & B. R. Co.* v. *Howard*, 54 U. S. 13 How. 326, 337, 14 L. ed. 169, 170, in delivering the opinion of the court, Mr. Justice Curtis says: "The plaintiff was endeavoring to prove, that the paper declared on bore the corporate seal of the Wilmington & Susquehanna Railroad Company. This being the fact to be proved, evidence that the corporation, through its counsel, had treated the instrument as bearing the corporate seal, and relied upon it as a deed of the corporation, was undoubtedly admissible. . . . The defendant not only induced the plaintiff to bring this action, but defeated the action in Cecil county court, by asserting and maintaining this paper to be the deed of the company; and this brings the defendant within the principle of the common law, that when a party asserts what he knows is false, or does not know to be true, to another's loss, and his own gain, he is guilty of a fraud; a fraud in fact, if he knows it to be false, fraud in law if he does not know it to be true." We are clearly of the opinion that the defendant cannot be heard to say that what was asserted on a former trial was false, even if the assertion was made by mistake. If it was a mistake, of which there is no evidence, it was one made by the defendant, of which he took the benefit, and the plaintiff the loss, and it is too late to correct it.

2. When the first foreclosure was had, the clerk failed to issue an execution as required by law, and after the death of the plaintiff one was issued in his name. After the claimant had succeeded in obtaining a judgment of the court that the second foreclosure was invalid and the first foreclosure was valid, this execution, issued in the name of the deceased plaintiff, was, upon the *ex parte* application of the executor of the wife and sole heir of such plaintiff, quashed, and a new execution, in his name as executor, issued. No notice or service of this application was made upon the defendant in the judgment, or any other person. Certainly no one was entitled to notice except the defendant. Ought he to have been served? The issuing of an execution is a mere ministerial act, and, while it is not necessary to decide in this case whether an execution issued upon a judgment in favor of the plaintiff after his death is valid, still, if the legal representative of the owner of the judgment sees proper to have, by an order of court, an execution framed in accordance with the peculiar facts of the case at the time it is issued, we see no reason why notice should be given to the defendant of an intention to apply to the judge for an order to the clerk to do that which it would seem the clerk would have authority to do without such order. In any event, the claimant will not be heard to object to the execution on the ground that it was issued by the order of the judge without notice to the defendant, unless she alleged some valid reason why the judge should not have passed the order. No such reason appears in the present case. Civ. Code, §§ 3354, 3355.

3. When parties to a case agree to submit the same for decision upon an agreed statement of facts, and nothing is said in the agreement to the contrary, each party is absolutely bound and concluded by the statements of fact thus agreed to, so far as the trial in which the stipulation is made is concerned. Where the agreement is not expressly limited to use in the trial in which it is made, it is admissible in evidence as an admission in any other trial or litigation between the same parties, where the same issues are involved; but it is not abso-

lutely binding and conclusive upon the parties. When it is used against such parties in another trial of the same case, or in any other case, either party has the right to attack any statement of fact made therein either by disproving or rebutting the same or explaining it away. If parties enter into an agreed statement as to the facts in a case, and do not desire such statement to be used against them thereafter, they should distinctly stipulate to that effect. There being nothing in the agreed statement of facts which was introduced in this case to indicate that it was only intended to apply to the former litigation, the court did not err in allowing it to be introduced in evidence. Especially would this be no error in the present case, where there was no effort made to attack any statement of fact made therein, and the claimant's case absolutely depended upon facts set forth in the agreement.

4. The controlling question in this case arises out of the assignment of error which complains of the directing of a verdict for the plaintiff in execution. Was this erroneous under the facts as they appear in the record? The contest was between a mortgagee, who was the victim of a theft of the mortgage and a forced cancelation of the same, entered upon the record, and the purchaser, who bought in good faith, believing that the cancelation as it appeared of record was genuine and authorized. That title to property cannot be taken away by theft is a principle well settled. The seller can convey no greater title than he himself possesses. Civ. Code, § 3538; 2 Schouler, Pers. Prop. 3d ed. § 19. It is equally well settled that an owner of property will not be deprived of his right to the same by the commission of a forgery, and this is true even where the claimant under the forged instrument had no notice of the forgery, and honestly believed that it was valid and genuine. *Sampeyreac* v. *United States*, 32 U. S. 7 Pet. 222–240, 8 L. ed. 665–671; *Van Amringe* v. *Morton*, 4 Whart. 382, 34 Am. Dec. 517; *D'Wolf* v. *Haydn*, 24 Ill. 525; *Arrison* v. *Harmstead*, 2 Pa. 191; *Wallace* v. *Harmstad*, 44 Pa. 492; *Gray* v. *Jones*, 14 Fed. Rep. 83; *Reck* v. *Clapp*, 98 Pa. 581–586. In the case of *Western U. Teleg. Co.* v. *Davenport*, 97 U. S. 372, 24 L. ed. 1049, which was a suit in equity to compel the defendant, a corporation, to replace in the name of the appellants certain shares of capital stock alleged to have belonged to them, and to have been transferred, without their authority, on its books, to other parties, the transfer having been made under a forged power of attorney, Mr. Justice Field, speaking for the court, says: "In many instances they [officers of the corporation] may be misled without any fault of their own, just as the most careful person may sometimes be induced to purchase property from one who has no title, and who may perhaps have acquired its possession by force or larceny. Neither the absence of blame on the part of the officers of the company in allowing an unauthorized transfer of stock, nor the good faith of the purchaser of stolen property, will avail as an answer to the demand of the true owner. The great principle that no one can be deprived of his property without his assent, except by the processes of the law, requires in the cases mentioned that the property wrongfully transferred or stolen should be restored to its rightful owner. The maintenance of that principle is essential to the peace and safety of society, and the insecurity which would follow any departure from it would cause greater injury than any which can fall, in case of unlawful appropriation of property, upon those who have been misled and defrauded."

As the conduct of Knapp included both a theft of a mortgage and a forgery of the cancelation, it appears clearly from the authorities cited that by these wrongful acts on his part McWilliams, the true owner of the mortgage, was not deprived of his right of property therein. But it is contended that McWilliams was negligent in allowing Knapp to have possession of the mortgage, and that by his negligence, together with a failure on his part to examine the envelop after Knapp had returned it to him, he put it in the power of Knapp to perpetrate this fraud upon Mrs. Luther. The doctrine that, where one of two innocent persons must suffer, the loss must fall upon him who has placed it in the power of the wrongdoer to bring about the injury, is invoked for the protection of the claimant in this case. This doctrine is not applicable to cases of this character. Under the facts as they appear in the record, there was no such trust or confidence placed by McWilliams in Knapp in allowing him, in his absence, to have possession of the papers, as would authorize the application of the doctrine above referred to. There is nothing in the evidence to indicate that McWilliams was put upon notice of any fraudulent intent on the part of Knapp. There was no relation, confidential or otherwise, between McWilliams and Knapp, which could mislead anyone into the belief that Knapp was authorized by McWilliams to cancel the mortgage, and have the cancelation entered upon the record. It is simply a case of one person surreptitiously getting into possession of the paper of another, and using it in an unauthorized and unwarranted way, and perpetrating fraud upon the owner of the paper. The fact that another innocent person is also the victim of the fraud is no reason why the owner should be deprived of his property. In no proper sense did the conduct of McWilliams place it in the power of Knapp to commit a fraud upon Mrs. Luther, so as to estop him from enforcing the lien of his mortgage upon the property. Even if the act of McWilliams in allowing Knapp to inspect the mortgage was negligence, it was only negligence in that broad unrestricted sense in which the term is often used, and was not that character of negligence which would be the foundation of an estoppel. *Wood* v. *Steele*, 73 U. S. 6 Wall. 80, 18 L. ed. 725; *King* v. *Sparks*, 77 Ga. 285.

In the case of *Bangor Electric Light & Power Co.* v. *Robinson*, 52 Fed. Rep. 520, where two persons, had a safety-deposit box in common, and one of them, without authority, abstracted therefrom a certificate of stock indorsed in blank, belonging to the other, and transferred it to an innocent purchaser for value, where the doctrine above referred to was invoked, Circuit Judge Putnam, in delivering the opinion of the court, says: "The contest at bar relates to the mere negligence of the original holder, and how far this may

prevent him from reclaiming his property. At first it occurred to the court that, inasmuch as Robinson had seen fit to leave this certificate in such condition as to indicate that somebody was authorized to acquire it and fill in the indorsement, he was barred; but the court is unable to find any authorities sustaining this suggestion, and is compelled to treat this certificate, indorsed in blank and stolen, as it would any other stolen property aside from strictly negotiable securities." In the case of *Baxendale* v. *Bennett*, L. R. 3 Q. B. Div. 525, the defendant gave H. his blank acceptance on a stamped paper, and authorized him to fill in his name as drawer and it was returned to the defendant with the blank unfilled, and was placed by him in an unlocked drawer of his writing table at his chambers, to which his clerk, laundress, and other persons coming there had access. From this place it was lost or stolen, and came into possession of C., who, without authority, filled in the blank with his name; and in this condition the bill came into the hands of the plaintiff, who was a bona fide purchaser for value, without notice of the fraud. The defendant was held not liable on the bill. Bramwell, L. J., in his opinion, says: "But a crime was committed in this case by the stealing of the document, and without that crime the bill could not have been complete, and no one could have been defrauded. Why is not the defendant at liberty to show this? Why is he stopped? What has he said or done contrary to the truth, or which should cause anyone to believe the truth to be other than it is? Is it not a rule that everyone has a right to suppose that a crime will not be committed and to act on that belief? Where is the limit if the defendant is estopped here? . . . The defendant here has not voluntarily put into anyone's hands the means, or part of the means, for committing a crime. But it is said that he has done so through negligence. I confess I think he has been negligent; that is to say, I think that if he had had this paper from a third person, as a bailee bound to keep it with ordinary care, he would not have done so. But then this negligence is not the proximate or effective cause of the fraud. A crime was necessary for its completion." In the case of *Van Amring* v. *Morton*, 4 Whart. 382, 34 Am. Dec. 517, where it appeared that a deed executed and acknowledged by the grantor with a blank for the grantee's name was kept by the grantor locked in his drawer, and that he trusted his brother with the key, who, being induced by a third person, surreptitiously took out the deed, and filled up the blank, and in this condition a bona fide purchaser for value accepted the deed from the grantee whose name was thus inserted, it was held that the purchaser stood in no better position than the fraudulent holder, and that no title passed. In the case of *Arrison* v. *Harmstead*, 2 Pa. 191, where a conveyance reserving a rent in fee was altered by the insertion of material words after delivery by the agent of the grantor, it was held that the effect of the fraudulent alteration was to avoid the covenants reserving rents, and to preserve the fee simple to the innocent grantee discharged from the covenants in the deed, and that the innocent purchaser from the fraudulent grantor would not be entitled to collect the rents reserved. Rogers, J., in the opinion, says: "It is said that Mrs. Lewis is a bona fide purchaser, without notice, and that the action may be sustained on that ground. But conceding that she is, her situation is no better than the fraudulent grantor's. Although the title of the grantor was, in its inception, good, it became absolutely void by matter *ex post facto*. At the time of the assignment, the title being avoided, the assignor had nothing to convey; of course nothing passed to the assignee. It may be, and perhaps is, a hard case. Fraud may be committed on an innocent purchaser, who may find it difficult to guard against imposition. This is conceded; but it is far better to encounter this risk, than to give the least countenance to any alteration whatever of a solemn instrument of writing, which would certainly be the result, if the guilty party could escape the consequences of his fraud by a transfer, real or pretended, to a person who might assume the garb of an innocent purchaser for a valuable consideration. We cannot lay too many restraints upon trick, artifice, and fraud." This is no doubt a hard case upon Mrs. Luther. To hold that she is protected would be equally hard upon the estate of McWilliams. Under the view we take of the matter, McWilliams was not guilty of such negligence as would deprive him of any of his legal rights. Indeed, he seems to have done no more than an ordinarily prudent person would have done under similar circumstances; and, following the authorities which seem to be conclusive upon the subject, we hold that the purchaser from Knapp, although she purchased in good faith, without notice of the fraud and forged cancelation by him, and in the honest belief that the forged cancelation was valid, took the property subject to the lien of the mortgage.

Judgment affirmed.

PENNSYLVANIA SUPREME COURT.

John J. CARTER, *Appt.*,
v.
PRODUCERS' OIL COMPANY, Limited, *et al.*

(182 Pa. 551.)

A rule of a partnership association excluding the right of a member to purchase additional shares and exercise the rights of a member in respect of them until he shall be re-elected to membership in respect of those shares, is valid under the act of June 25, 1885, providing that interests in such associations shall be personal estate and transferred under such rules and regulations as the associations prescribe.

(October 11, 1897.)

APPEAL by plaintiff from a decree of the Court of Common Pleas for Warren County in favor of defendants in a suit brought to compel defendants to transfer to plaintiff certain stock which he alleged belonged to him. *Affirmed.*

The facts are stated in the opinion of the lower court, which was as follows:

"I have found as a fact that the plaintiff is the bona fide owner of the stock which he seeks by his bill to have transferred to him. In so doing, I have negatived so much of paragraph c of the defendant's 5th proposition of law as avers that the plaintiff has not overcome the responsive denial of the answer as to the *bona fides* of his ownership. The proof of ownership offered by the plaintiff consisted of the production of the certificates issued by the Producers' Oil Company, Limited, evidence establishing their genuine character, and the due execution by the holders thereof of the transfers printed on the back of the certificates. To this was added his own testimony that he purchased the shares from the National Transit Company, and paid for the same in cash with his own money, and that no other person had any interest therein. He produced the check by which payment was made, the receipt of the National Transit Company, and other documents corroborating his testimony. This was certainly enough, in the absence of countervailing proof, to establish his unqualified ownership against the general and vague denial of the answer. It was declared in *Riegel* v. *American L. Ins. Co.* 153 Pa. 134 (the present chief justice delivering the opinion), that an averment of a fact in an answer which could not, in the nature of the case, be within the personal knowledge of him by whom it is sworn, and which is no more than 'an expression of his strong conviction of its existence, or what he deems an infallible deduction from the facts which were known to him,' is not responsive in the sense that it is evidence in his favor, so as to put the plaintiff upon proof by two witnesses. But it is unnecessary to invoke this principle, for the proof was abundant and practically uncontradicted.

"The proposition, however, raises the question of the good faith of the plaintiff in bringing this suit, and this is a broader question. It is said that he is 'shown to be acting in conspiracy with the Standard Oil Trust, in furtherance of its interests and purposes, and not for the welfare of the defendant.' The findings of fact establish that the plaintiff, in purchasing the stock in question, sought to obtain the control of the company; that his avowed purpose is to change its policy, so as to make it unobjectionable to the Standard Oil Trust, and so that it will be against the wishes and purposes of the other members of the company; also, that the Standard Trust is engaged in the same business as the defendant company, and that, at the time the National Transit Company sold the stock to the plaintiff, its agents received assurances, not amounting to an enforceable contract, that his action would be such as they desired. In my opinion, the motives and intentions of the persons composing the Producers' Oil Company, Limited, in organizing that company, are not material, except so far as they are expressed in the contract which they made with each other. We deal exclusively with the means which they adopted to carry out their purposes, whatever they were. A large amount of testimony was given relating to the preliminary steps looking towards the organization of the company, but, as it failed to show an agreement between the body of subscribers to the capital, we give it no consideration. Its only relevancy, if fully proved, would be to show that the purpose in the minds of the promoters was to deprive the Standard Trust of the Producers' oil, and to furnish a competitive market for the same. These purposes are not unlawful, and, if the means adopted were adequate, might be accomplished. But whether accomplished or not must depend upon the adequacy or inadequacy of the means.

"Nor can I see my way clear to refuse the relief prayed for on the ground that the plaintiff's motives and intentions are at variance with the purpose and wishes of his fellow members. If what he desires and intends to do as a member of the company, controlling a majority in value of interest of its capital, is legally and equitably his right, the court cannot refuse to aid him because it may think he ought not so to act; and, if it is not legally or equitably his right, the power of the court may be invoked to prevent his abuse of his power, but it does not justify refusing him such rights as he clearly has. The action of the court is not invoked by reason of any supposed equity in the plaintiff, but by reason of an alleged deprivation of his legal rights as a member of an association over which the court is given, by express statute, the supervision and control. Nor does the fact, which is apparent, that the policy which the plaintiff desires to adopt is

NOTE.—As to limited partnerships, see also the three cases immediately preceding this.

As to restrictions by by-laws on the right to transfer shares of a corporation, see New England Trust Co. v. Abbott (Mass.) 27 L. R. A. 271, and *note*; Ireland v. Globe Milling & Reduction Co. (R. I.) 29 L. R. A. 429; and Victor G. Bloede Co. v. Bloede (Md.) 33 L. R. A. 107.

See also 38 L. R. A. 791; 39 L. R. A. 701.

also desirable to the Standard Oil Trust, in my mind furnish a reason for refusing relief, since we are compelled to believe that, although agreeing with that organization in opinion and policy, the plaintiff appears in his own right as a bona fide owner of shares.

"The cases cited for the defendant on this point are clearly distinguishable from the case in hand. *Baker's Appeal*, 108 Pa. 510, 56 Am. Rep. 231, and *Gould* v. *Head*, 41 Fed. Rep. 240, turned upon the fact that the plaintiff was not the real owner of the stock. *Kenton* v. *Union Pass. R. Co.* 54 Pa. 452, and *Cambios* v. *Philadelphia & R. R. Co.* 4 Brewst. (Pa.) 592, were cases in which it was attempted to control the action of a corporation by suits brought in the character of stockholders by persons who had bought stock for the mere purpose of bringing suit in the interest of outsiders. *Foll's Appeal*, 91 Pa. 434, 36 Am. Rep. 671, was a bill to compel specific performance of a contract to deliver stock in a national bank. The mere right of the plaintiff under his contract furnished no ground for the specific performance sought in equity, but the relief was demanded on the supposed equity arising from the fact that the plaintiff was already the owner of stock which with the stock contracted for would give him control of the bank, and enable him to elect himself and his friends directors and officers. Specific performance was refused, on the ground that the circumstances relied upon raised no equity in the plaintiff. It was said that the bank was a quasi-public corporation, and that it was against public policy that the control should be in the hands of a single individual. *Gage* v. *Fisher*, 5 N. D. 297, 31 L. R. A. 557, was similar, but there was only a contract to permit the plaintiff to control the stock without actually buying it. None of the cases cited involved the right of a stockholder to be recognized as such; nor do any of them involve the denial of the ordinary equitable remedies to one standing wholly upon a legal right. On the other hand, the case of *Rice* v. *Rockefeller*, 134 N. Y. 174, 17 L. R. A. 237, seems to me fully in point upon the present question; and *Camden & A. R. Co.* v. *Elkins*, 37 N. J. Eq. 273, furnishes even a closer analogy. If the plaintiff is the bona fide owner of the interest in the capital of the defendant company which he claims, and is entitled, under the laws and rules of the company, to represent that interest in the meetings of its members, it cannot be that any legal or enforceable equitable right of the company can be infringed by requiring it to recognize his title. If, by his action or attempted action, the rights, legal or equitable, of any other member are infringed, that action may be restrained or controlled. But no other member of the company is before the court as a party in that character. The real contention of the defendants seems to be, not so much that the company will suffer if the relief prayed for be granted to the plaintiff, as that other members in their individual character as producers of oil will be injured; and this is a controversy which we are manifestly unable to determine in this proceeding.

"I turn, therefore, to the question raised upon the undisputed facts by the plaintiff's 1st, 2d, 3d, 4th, 5th, 7th, 8th, and 10th, and the defendant's 1st, 2d, 3d, and 4th, propositions of law. Under the law governing 'partnership associations' formed under the act of June 2, 1874, and its amendments, and the agreement, rules, and regulations governing the Producer's Oil Company, Limited, is a member of that company who purchases additional shares entitled to represent such additional interest in the capital in the meetings of the company, without being elected to membership in respect to such additional interest? The 4th section of the act of June 2, 1874, as amended by the act of 25th of June, 1885, provides as follows: 'Section 1. Interest in such partnership associations shall be personal estate, and may be transferred, given, bequeathed, distributed, sold, or assigned, under such rules and regulations as such partnership associations shall, from time to time, prescribe, by a vote of a majority of the members in number and value of their interests, and in the absence of such rules and regulations the transferee of any interest in any such association shall not be entitled to any participation in the subsequent business of such association, unless elected to membership therein by a vote of a majority of the members in number and value of their interests. And any change of ownership, whether by sale, death, bankruptcy, or otherwise, which occurs in the absence of any rules and regulations of such associations regulating such transfer, and which is not followed by election to membership in such association, shall entitle the owner or transferee only to the value of the interest of the date of acquiring such interest, at a price and upon terms to be mutually agreed upon, and in default of such agreement at a price and upon terms to be fixed by an appraiser to be appointed by the court of common pleas of the proper county, on the petition of either party, which appraisement shall be subject to the approval of said court.' The provisions of this section affecting the status of transferees of interests are only operative in the absence of rules and regulations prescribed by the association by a vote of a majority of the members in number and value of their interests. On June 5, 1894, over a year before the plaintiff purchased any of the shares involved in this controversy, the Producers' Oil Company, Limited, in the manner prescribed by the act, and also in conformity with the provision in the rules governing amendments thereto, adopted the amended rule set forth in the findings of fact. It is conceded that this rule, if valid, is conclusive against the rights claimed by the plaintiff in his bill. But it is contended that the rule is invalid, because no authority to make such a rule is given by the statute, because it is against the terms of the statute, and because it is in restraint of trade, in derogation of the rights of the members, and unreasonable in its provisions.

"The provision forbidding sales of shares except to a particular class of persons, and that requiring a member purchasing additional shares to be elected to membership in respect to such shares, are independent; either may stand though the other fall. The plaintiff, although he had never been lawfully expelled from membership in the P. P. A., was not at the time he purchased this stock qualified for membership therein by reason of his business

associations with the Standard Oil Trust. But the first clause of this rule deals with the right of a member to sell, and not to buy. No member of the company sold his stock to the plaintiff; nor are we able to determine whether or not the persons to whom they did sell were or were not qualified under this clause. We pass it by, therefore, to consider the last paragraph of the rule, which specifically covers the case in hand. Many cases are cited for the plaintiff to show that the right of a corporation to make by-laws for the regulation or transfers of stock does not include the right to place restrictions upon transfers. For the protection of the corporation, its stockholders and creditors, it may prescribe, by by-laws, the mode of transfer; but it cannot, without express authority in the charter, impose restrictions upon the free alienability of its shares, which is an incident of such property. The argument, however, fails when it is attempted to apply it to a 'partnership association;' for it is quite clear that the rules and regulations authorized by the act of 1885 are intended to govern more than the mere mode of transferring shares, and to embrace the status of a transferee in respect to the association. The language is: 'Interests may be transferred, given, bequeathed, distributed, sold, or assigned under such rules and regulations as such partnership association shall from time to time prescribe.' And as the act prescribes, not the manner of registering transfers, but the status of a transferee who has become the owner of an interest in the capital by gift, bequest, distribution, sale, assignment, or other mode of transfer, only in the absence of rules and regulations, it is necessarily implied that these rules and regulations, which are to take the place of the statutory provisions, may cover the same subject; and this is precisely what the first sentence of this section declares. If the association may not make rules and regulations covering the status of transferees as well as the manner of transfer, it follows that, in every association having rules and regulations governing the formal transfer of interests, any transferee becomes immediately a member without election, for the statute operates only in the absence of rules and regulations. Every association, if this be a correct construction of the law, will be required to choose between doing business without any rules at all governing the transfer of shares and the loss of all control over the membership through the adoption of such rules.

"It is quite too clear for argument that the power of partnership associations under the statute to make rules and regulations extends to the general subject of the status of transferees, and the manner in which they may become members, as well as to the mode of transfer; and the question is therefore narrowed to this: Is the provision requiring members of the company purchasing additional shares to be re-elected in respect thereto within this general power, or is it void as against the spirit and intention of the law? Whether the partnership association ought to be classified by the professor of legal science as a species of the genus corporation, or the genus partnership, or whether it should be set apart as a new genus, seems to me unimportant. If a corporation, it is so peculiar in its features that the general law of corporations cannot be applied to it without important modifications; if a partnership, it so differs from the common type that the general law of partnerships is but slightly applicable. Both the law of corporations and the law of partnerships are to be resorted to in the absence of statutory regulations, the choice being determined by the nature of the feature under consideration. In the present case we derive little assistance from either. The general rule of corporations invoked by the plaintiff has been laid down to meet the conditions existing in corporations in which the ownership of stock carries with it *ipso facto* membership in the corporate body. If there are corporations in which the conditions are different, it is manifest that the rule is inapplicable to the extent of the difference.

"The *delectus personarum*, as it exists in partnerships, grows out of the contract of the partners to be associated with each other, and with no others. The reason for it is found in the right of each partner to act as agent for all the others, the liability of each for the partnership obligations, and the right of each to contribution from the others. None of these conditions exist in partnership associations. The case of a transfer of interest from one partner to another is not analogous to the case in hand, for the dissolution is caused in such a case, not by the addition to the interest of one of the partners, which adds nothing to his power, but by the dropping out of the assigning partner, whose continuance is necessary to the partnership existence. A partnership association differs from the common type of partnerships in that the members vote and do not act with the powers of partners, and in that they are subjected to no joint liability. It differs from the common type of corporations in that the members have a right to admit or refuse membership in the company to the transferee of the interest, as well as in some other particulars. In determining whether the act of 1885 should be strictly construed against the power of the association to limit the right of one of its members to acquire control by increasing his interest, we ought to look to the spirit and intention of the act. The peculiar form of *delectus personarum*, so carefully guarded in partnership associations, cannot be based upon the same consideration which gives rise to the common form in partnerships, for there is no mutual agency, no joint liability. Looking at the general scheme of the act, it seems apparent that it was intended to enable persons desiring to combine their capital in any business enterprise to do so without incurring, on the one hand, the general liability of partners, or, on the other, the risk of having the business taken out of the control of those in whom it was originally placed without their consent, which exists in ordinary corporations. If this be true, it is manifest that transfers of interests from one member to another are within the mischief sought to be prevented, for the member's vote by value of interest as well as number upon most important questions.

"If the case of a member transferee is not included within the provisions of the statute, it is not because the letter of the law does not

include it, but because the court is moved by the context to limit its literal meaning. 'Interests,' the act declares, without indicating any exception, 'may be transferred . . . under such rules and regulations as such partnership association shall from time to time prescribe,' etc. 'Any change of ownership which occurs in the absence of any rules and regulations of such associations regulating such transfer . . . shall entitle the owner or transferee,' etc. But the term 'election to membership' is not happily chosen to express the consent of the members to the acquisition of a greater interest by one of their number. One who is already a member cannot be, in any proper sense of the term, elected to membership. The broad and general terms used in the act, together with the use of this phrase, inappropriate to the case of transfer between members, indicate that the particular case of such transfer was not present in the legislative mind. Had it been, the general terms would have been modified if it were intended to exclude it, and some modification of the term 'elected to membership' would have been made had the intention been specifically to include a transfer to one already a member. We can only ascertain the legislative will in a particular case by determining whether or not it falls within the general intention expressed in the law. And, while my mind inclines to the belief that such a case was not within the intention of the legislature, it is not without much doubt and some hesitation that I so decide. But it seems clear to me that the power of the association to regulate the status of transferees of interests in capital is not limited by the regulations prescribed by the act. In conferring upon the association authority to legislate for itself, it is implied that it may make rules which differ from those prescribed in the act. If the case of a transfer to one already in the membership be not included in the terms of the act, it is, at most, an omitted case, which the association itself may provide for. The rule adopted by the defendant is not against the terms of the act, for, at best, the act does not cover it at all. Nor is it unreasonable, for it is in line and harmony with the general spirit and intention of the act. Nor does it infringe any right of the members, for the owners of the shares may still freely sell them to whom they please, the only difference being that a sale to a member is put in the same category as a sale to other persons. No member can claim a vested right to a greater voting power than was given him by the articles of association. The full value of the interest is guaranteed to the purchaser in any event.

"Thus far we have considered the rules and regulations of the defendant as mere by-laws, imposed by a majority under the authority of the statute. The original rules were, however, agreed to and signed by all the members at the time the company was organized, and as part of its organization. They have therefore the effect of articles of association additional to the certificate filed as required by law. The plaintiff had notice of them, both actual and constructive. He is therefore bound by this agreement, and one of its provisions is that it may be altered by a vote of the majority of the members in number and value of their interests. It was so altered long prior to his purchase of the shares in question, no vote being against it except his own. Conceding that the authority thus given to alter cannot be carried so far as to permit a change in the general scope of the instrument; that no change can be made against the mandate of positive law, or contrary to the certificate of association, or which is unreasonable or oppressive,—still, I think, this alteration is not an undue exercise of the power, for the same reasons which have been already adverted to, and which, considered in this aspect, are still more forcible and cogent.

"Being of opinion that the last clause of rule 25, which excludes the plaintiff from participation in the business and profits of the defendant in respect to the shares purchased by him until he shall be elected to membership in respect to such shares by the majority of the members in number and value of their interests, is valid, it follows that he is not entitled to the relief prayed for in his bill. His counsel in the argument distinctly disclaimed any desire to have the stock transferred upon the books of the company unless such transfer carried with it the right to vote and participate in the profits; and hence we do not consider the question whether so much of the relief prayed for might not properly be granted on the facts disclosed.

"It remains to consider the case for affirmative relief presented by the defendants upon their cross bill. At the time the plaintiff presented the certificates for 13,013 shares to the secretary of the company, and had new certificates issued to himself for the same, he was not in fact the owner of the interest represented by the certificates. He, in effect, represented himself to be owner by presenting them indorsed as they were in the usual form, and demanding the transfer to himself. But he is not the owner of the same shares by a subsequent purchase. And the National Transit Company, which was at the time owner, is clearly estopped by its own acts from asserting the ownership as against the defendant. We are required to note a difference here between partnership associations and ordinary corporations. In the latter the transfer of stock on the books invests the transferee with the full rights of a stockholder, including the right to vote the stock and to receive the dividends. In the former this right does not follow the transfer on the books, which is a merely ministerial act of an officer or clerk, but is obtained only by election to membership by the members of the company. We have held in the principal case that the plaintiff cannot participate in the business or profits of the defendant company as to purchased stock without re-election, and it follows that no clerk or officer can confer that right upon him by permitting a transfer upon the books. Apart from membership, and pending the appraisement of the value of the interest, or the sale of it to another who may be acceptable to the remaining members, it may be important, and it seems to me it is quite proper, that the interest should stand on the books of the company in the name of the true owner, both for its protection and his own. If we now grant the relief prayed for in the

cross bill, we shall restore the interest owned by the plaintiff on the books of the company to the names of the original members, and invest them with an apparent right to dividends and participation in the business to which they are not entitled, and which might be an injury to all concerned. The books of the company defendant do not show that the plaintiff is entitled to vote or participate in profits in respect to these shares, and it can therefore suffer no injury from an unauthorized transfer. Let a decree be drawn dismissing both the plaintiff's bill and the cross bill filed by the defendant, at the costs of the plaintiff; and, at the time of settling the decree, the court will hear either party upon any exceptions to the findings of fact or of law which they may file, respectively, within ten days after notice of the filing of this opinion."

Messrs. **Knox & Reed, Hinckley & Rice, Weil & Thorp,** and **Roberts & Carter,** for appellant:

The Producers' Oil Company, Limited, has no power or authority to adopt by-laws.

If such corporations are not quasi corporations, but unincorporated associations, with all the powers and liabilities of general partnerships, except as modified by statute or the articles of association, they then have no power to adopt by-laws unless given by statute or by the articles of association. The latter are silent on the subject, and no statute gave such authority until the act of June 9, 1895.

3 Am. & Eng. Enc. Law, N. S. p. 1060; *Livingston* v. *Lynch*, 4 Johns. Ch. 573; *Thomas* v. *Ellmaker*, 1 Pars. Sel. Eq. Cas. 98; Niblack, Mut. Ben. Soc. § 16; 1 Morawetz, Priv. Corp. § 491.

If such associations are quasi corporations, with all the powers incidental thereto, except as modified by statute or the articles of association, then they have the power to adopt by-laws, and of course are governed by the laws relating to corporations with reference to such by-laws, which laws declare this by-law to be void.

These associations are quasi corporations.

Oak Ridge Coal Co. v. *Rogers*, 108 Pa. 147; *Stevens* v. *Philadelphia Ball-Club*, 142 Pa. 52, 11 L. R. A. 860; *Patterson* v. *Tidewater Pipe Co.* 12 W. N. C. 452; *Hill* v. *Stetler*, 127 Pa. 161; *Whitney* v. *Backus*, 146 Pa. 29; *Brier Hill Coal & I. Co.* v. *Atlas Works*, 146 Pa. 290; *Laflin & R. Powder Co.* v. *Steytler*, 146 Pa. 434, 14 L. R. A. 690; *Billington* v. *Gautier Steel Co.* 19 W. N. C. 339; *Com.* v. *Sandy Lick Gas, Coal, & Coke Co.* 16 Phila. 599.

Associations with the powers of the Producers' Oil Company, Limited, are held to be corporations by the Federal Supreme Court.

Liverpool & L. Life & F. Ins. Co. v. *Oliver*, 77 U. S. 10 Wall. 566, 19 L. ed. 1029.

As corporations, whether quasi or in fact, no good reason can be shown why they should not be governed by the analogies of corporation law, by whatever name the association may be called.

Waterbury v. *Merchants' Union Exp. Co.* 50 Barb. 157; *Rice* v. *Rockefeller*, 134 N. Y. 174, 17 L. R. A. 237.

No such by-law can be adopted by any corporation without express authority of the clearest and most unequivocal kind, and such authority must be contained in the charter or the statute.

Re Klaus, 67 Wis. 401; 1 Cook, Stock & Stockholders, § 408; *Bank of Attica* v. *Manufacturers' & T. Bank*, 20 N. Y. 501; *Brinkerhoff-Farris Trust & Sav. Co.* v. *Home Lumber Co.* 118 Mo. 447.

There is a distinction between "by-laws" and "rules and regulations" recognized by all law-writers. By-laws are intended to control the action of the corporation. "Rules and regulations" are intended to control the conduct of third persons dealing with the corporation.

Waterman, Corp. § 77; 1 Morawetz, Corp. § 501; Boisot, By-Laws of Priv. Corp. § 5; 1 Thomp. Corp. § 937; 1 Am. & Eng. Enc. Law, p. 705.

The words of both the act of 1874 and 1885 apply, not to restrictions upon transfer, but to the formal requisites to make a transfer effectual, to the formalities of transfer.

23 Am. & Eng. Enc. Law, p. 64, citing *Chouteau Spring Co.* v. *Harris*, 20 Mo. 382; *Feckheimer* v. *National Exch. Bank*, 79 Va. 80; *Johnston* v. *Laflin*, 103 U. S. 800, 26 L. ed. 532; *Moore* v. *Bank of Commerce*, 52 Mo. 377; *Com.* v. *Gill*, 3 Whart. 228; *Victor G. Bloede Co.* v. *Bloede*, 84 Md. 129, 33 L. R. A. 107; *Driscoll* v. *West, B. & C. Mfg. Co.* 4 Jones & S. 488, 59 N. Y. 96; *Bank of Atchison County* v. *Durfee*, 118 Mo. 431.

Only one restriction is anywhere provided for by the act, that is, election to membership of transferees not already members, in the absence of rules and regulations doing away with such election, and therefore no other restriction can be added. By implication all other restrictions are excluded.

Coast-Line R. Co. v. *Savannah*, 30 Fed. Rep. 649; *Diligent Fire Co.* v. *Com.* 75 Pa. 291; *Raynor* v. *Beatty*, 9 W. N. C. 201.

Having authorized the adoption of rules and regulations for some purposes, power to adopt them for other purposes is excluded.

Ang. & A. Corp. § 375; *Child* v. *Hudson Bay Co.* 2 P. Wms. 207; *Ireland* v. *Globe Milling & Reduction Co.* 19 R. I. —, 29 L. R. A. 429.

The alleged by-law or rule and regulation is void, because not within the scope of subjects to be controlled by by-laws or rules or regulations.

Taylor, Priv. Corp. § 7; 1 Bl. Com. 475; Waterman, Corp. §§ 72, 83; Ang. & A. Corp. §§ 325, 345; 1 Morawetz, Priv. Corp. § 491; Cook, Stock & Stockholders, § 700A; 1 Thomp. Corp. § 935; 2 Kyd, Corp. 122; *Taylor* v. *Griswold*, 14 N. J. L. 227, 27 Am. Dec. 33.

The right to vote upon stock cannot be denied or abridged because of alleged wrongful motives influencing the holder in buying and holding the stock.

1 Cook, Stock & Stockholders, § 618, citing *Pender* v. *Lushington*, L. R. 6 Ch. Div. 70; *Re Stranton, Iron & S. Co.* L. R. 16 Eq. 359; *People, Barker*, v. *Kip*, 4 Cow. 383, note; *State* v. *Smith*, 48 Vt. 290; *Moffatt* v. *Farquhar*, L. R. 7 Ch. Div. 591; *Camden & A. R. Co.* v. *Elkins*, 37 N. J. Eq. 273; *Rice* v. *Rockefeller*, 134 N. Y. 174, 17 L. R. A. 237; *Farmers' Loan & T. Co.* v. *New York & N. R. Co.* 150 N. Y. 410, 34 L. R. A. 76.

Messrs. **Watson & McCleave** and **Samuel S. Mehard**, for appellees:

The plaintiff cannot extend his membership in the defendant company from the one three-hundredth part to over a majority of its capital, without a novation of the contract under which the company was formed, and this can be effected only by the mutual consent of the parties.

The defendant company was formed by the contract of its members.

The relation of members in such an association results entirely from the contract entered into by them in forming the company, whether it be viewed from the standpoint of a partnership or from that of a corporation.

Lindley, Partn. *1; 1 Morawetz, Priv. Corp. 1st ed. §§ 2, 3, 12, 27-31, 126-135.

The contract whereby the defendant company was formed cannot be changed save by the mutual consent of the parties.

Stone v. *Miller*, 16 Pa. 450; *Potter* v. *McCoy*, 26 Pa. 458; *Hartley* v. *Kirlin*, 45 Pa. 49; *Kemmerer's Appeal*, 102 Pa. 558; *Walstrom* v. *Hopkins*, 103 Pa. 118; 1 Parsons, Contr. *220; 1 Morawetz, Priv. Corp. 1st ed. § 321.

The contention of the plaintiff involves a material change in the contract under which the defendant company was formed.

The statutes under which the defendant company was organized do not involve consent to an extension of membership without further action of the parties.

Eliot v. *Himrod*, 108 Pa. 569.

Words are generally to be understood in their usual and most known signification; not so much regarding the propriety of grammar, as their general and popular use.

Bl. Com. *59; Endlich, Interpretation of Statutes, § 4; Black, Interpretation of Laws, 35; *Bradbury* v. *Wagenhorst*, 54 Pa. 180; *Allegheny County* v. *Gibson*, 90 Pa. 397, 35 Am. Rep. 670; *Pittsburgh* v. *Kalchthaler*, 114 Pa. 547.

A construction which would leave without effect any part of the language of the act is a most improbable one.

Endlich, Interpretation of Statutes, 23; *Com.* v. *Shopp*, 1 Woodw. Dec. 123; *Packer* v. *Sunbury & E. R. Co.* 19 Pa. 211; *Howard Asso.'s Appeal*, 70 Pa. 344.

The spirit and reason of the statutes likewise forbid an extension of plaintiff's membership without the consent of his fellows.

1 Bl. Com. *61.

If the meaning of the statute is doubtful as to rule governing transfers to members, the construction must follow the common law, which requires the express consent of all the partners to an enlargement of a partner's membership.

Black, Interpretation of Laws, 110; *Arthur* v. *Bokenham*, 11 Mod. 148; *Doner* v. *Stauffer*, 1 Penr. & W. 198, 21 Am. Rep. 370; *Baker's Appeal*, 21 Pa. 76; *Cooper's Appeal*, 26 Pa. 262; *Vandike's Appeal*, 57 Pa. 9; Parsons, Partn. §§ 106, 108; *Cochran* v. *Perry*, 8 Watts & S. 262.

The rules of the common law have been applied to partnership associations formed under the act in question, except where expressly changed by the provisions of the act by this court in numerous cases.

Maloney v. *Bruce*, 94 Pa. 249; *Hill* v. *Stetler*, 127 Pa. 145; *Vanhorn* v. *Corcoran*, 127 Pa. 255, 4 L. R. A. 386; *Lennig* v. *Penn Morocco Co.* 16 W. N. C. 114; *Crowther* v. *Upland Industrial Co-Op. Asso.* 1 Del. Co. Rep. 264; *Small's Estate*, 151 Pa. 5; *Eliot* v. *Himrod*, 108 Pa. 569; *Ames* v. *Downing*, 1 Bradf. 321; *Jaffe* v. *Krum*, 88 Mo. 669; *Allen* v. *Long*, 80 Tex. 261; *Imperial Refining Co.* v. *Wyman*, 38 Fed. Rep. 574, 3 L. R. A. 503; *Carnegie* v. *Hulbert*, 10 U. S. App. 454, 53 Fed. Rep. 10, 3 C. C. A. 391; *Chapman* v. *Barney*, 129 U. S. 682, 32 L. ed. 801; *Robbins* v. *Butler*, 24 Ill. 387; *Dennis* v. *Kennedy*, 19 Barb. 517; *Taft* v. *Ward*, 106 Mass. 518.

The rule was authorized by the statute.

Laflin & R. Powder Co. v. *Steytler*, 146 Pa. 434, 14 L. R. A. 690; Ang. & A. Corp. 11th ed. § 342.

The purpose of the plaintiff to gain control of the defendant company, and to so manage its affairs as to supply the Producers' oil to the Standard Oil Company is wrongful, and aid will not be given by a court of equity to enable him to carry it out.

Forrest v. *Manchester, S. & L. R. Co.* 4 De G. F. & J. 126; *Rice* v. *Rockefeller*, 134 N. Y. 174, 17 L. R. A. 237; *Foll's Appeal*, 91 Pa. 434, 36 Am. Rep. 671.

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

We think the court below entered the proper decree in this case. The plaintiff filed his bill to compel the defendant company to concede to him the rights of a member as to shares of which he was merely a transferee. The shares so held by him, together with the shares he subscribed for, represented a clear majority of the capital of the company. On payment of his subscription in accordance with its terms, he was duly elected to membership in the company, and he then received from it a certificate for 300 shares of its capital, of the par value of $10 each, that being the number of shares for which he had subscribed. Afterwards, and prior to the institution of this suit, he purchased from the National Transit Company 29,764 shares, and from other persons 131 shares, making in all 29,875 shares in addition to his original 300 shares. The shares thus purchased by him were shares which members of the defendant company had sold, and which the parties from whom he had purchased had bought. The National Transit Company was then one of the companies affiliated with the Standard Oil Company and controlled by what is known as the "Standard Oil Trust," in which the plaintiff was a shareholder at the time of his purchase. His avowed purpose in making the purchases mentioned was to obtain control of the defendant company, and change its policy from what he characterized as "gad fly" competition with the Standard to such competition as he believed would be unobjectionable to it. There is reason to believe that he could not have obtained the stock but for the assurance that he would use the power he supposed it would give him to accomplish his declared purpose. While it is probable the accomplishment of his purpose would be advantageous to him, it is very clear that the other members of the defendant company regarded his scheme as

fatal, if carried out, to the principal object intended to be achieved by the organization of the company, and as destructive of their interests in it. The principal and controlling question raised by the bill and answer is whether the plaintiff is entitled, by reason of his election to membership in the defendant company, on payment of his subscription, to have transferred to him on the books of the company and to vote the shares purchased as above stated. The plaintiff contends that he is, and the defendant company contends that he is not. The arguments in support of and against their respective contentions are exhaustive and able, but an extended review of them is not deemed essential to a proper determination of the question we have to consider.

It is conceded that the plaintiff has no right to vote the shares he purchased as above stated if the rule of June 5, 1894, is valid. It appears from the tenth finding of fact that the rule was adopted by the vote of a majority in number and value of interests of the members of the defendant company. To determine whether it was in the power of the company to establish the rule, we must look to the statutes under which it was organized. As bearing on this question it is sufficient to refer to the act of June 25, 1885 (Pub. Laws, 182), which is amendatory of the 4th section of the act of June 2, 1874 (Pub. Laws, 271). It is as follows: "Interests in such partnership associations shall be personal estate, and may be transferred, given, bequeathed, distributed, sold, or assigned under such rules and regulations as such partnership associations shall from time to time prescribe by a vote of the majority of the members in number and value of their interests; and in the absence of such rules and regulations the transferee of any interest in any such association shall not be entitled to any participation in the subsequent business of such association, unless elected to membership therein by a vote of a majority of the members in number and value of their interests. And any change of ownership, whether by sale, death, bankruptcy, or otherwise, which occurs in the absence of any rules and regulations of such associations regulating such transfer, and which is not followed by election to membership in such association, shall entitle the owner or transferee only to the value of the interest so acquired at the date of acquiring such interest, at a price and upon terms to be mutually agreed upon, and in default of such agreement, at a price and upon terms to be fixed by an appraiser to be appointed by the court of common pleas of the proper county, on the petition of either party, which appraisal shall be subject to the approval of said court." It will be observed that the statute makes no distinction between a transferee who is a member of the partnership association and a transferee who is not a member of it. The language of the statute fairly excludes such distinction, and there is nothing in the articles of association which warrants it. It is a distinction which, if made, would enable a member of the association to obtain a controlling interest in it by a purchase of a sufficient number of the shares to defeat the controlling purpose of its organization, and to impair, if not absolutely destroy, the interests of the other members. If the legislature had intended to make this distinction, it could and presumably would have done so in a few words. The absence of anything in the statute indicative of a purpose to make it tends to confirm the view that members who purchase shares sustain the same relation to them as purchasers who are not members. Of what avail is it to deny to a stranger who buys shares of the capital of the association the right to vote them without its consent, manifested by his election to membership therein, while a member of the association who desires to obtain control of it, to defeat the purpose for which it was organized, and to change its policy, in the interest of a rival company, is allowed to vote without its consent the shares he has purchased? It seems to us that a construction of the statute which admits of such results is opposed to the spirit as well as the letter of it, and that so much of the rule of June 5, 1894, as puts the member who purchases shares on the same footing with respect to them as the strangers who purchase shares is in clear accord with and authorized by it. We cannot assent to the plaintiff's claim that the defendant company is a corporation, and restricted in the adoption of by-laws, rules, and regulations for its government to such as it is within the power of the latter to prescribe. It may be conceded that the defendant company has some of the qualities of a corporation, but it is nevertheless a partnership association, governed by the statutes and articles under which it was organized, and the rules and regulations it may prescribe in execution of the powers with which the statutes have invested it. We concur in, and need not add anything to, what the learned judge of the court below has so well said on this point, and in respect to the agreement or understanding between the parties when the company was organized. In accordance with the views expressed in this opinion, we overrule the specifications of error.

Decree affirmed and appeal dismissed, at the cost of the appellant.

WASHINGTON SUPREME COURT.

H. M. BENTON *et al.*, *Respts.*,
v.
Philip A. JOHNCOX *et al.*, *Appts.*

(17 Wash. 277.)

1. **The common-law rights of riparian proprietors** are incident to the estate of settlers upon public lands who acquire title from the government as against subsequent appropriators of the waters.
2. **The riparian rights of a patentee of the government** attach by relation at the very inception of his title, and will be protected as against subsequent appropriation of the water naturally flowing over the land.
3. **Existing riparian rights** are not affected by Laws 1873, p. 520, regulating irrigation and water rights.
4. **The doctrine of appropriation of water** applies only to public lands, and not to lands which have become private property.
5. **The common-law doctrine of riparian rights** is not inapplicable to an arid region in which irrigation is necessary to make the land productive.

(July 2, 1897.)

APPEAL by defendants from a judgment of the Superior Court for Yakima County in favor of plaintiffs in an action brought to enjoin defendants from interfering with plaintiffs' alleged rights in a stream flowing through their property. *Affirmed.*

The facts are stated in the opinion.

Messrs. **James B. Reavis** and **Ira P. Englehart**, for appellants:

This case is one of first impression in the appellate court.

In *Thorpe* v. *Tenem Ditch Co.* 1 Wash. 566, the court says: "It is the opinion of the court that the prior appropriator of the flow of any water over the public lands of the United States has a vested right therein."

In *Ellis* v. *Pomeroy Improv. Co.* 1 Wash. 572, it was there decided: "Watercourses on the public lands of the United States are subject to appropriation by use in accordance with local customs and laws; and vested rights so acquired cannot be devested by relation back of a patent granted."

In *Gadd's* v. *Parrish*, 1 Wash. 587, it was held: "Where one has appropriated the waters of a stream flowing across public lands, by erecting on his own land a ditch, one acquiring title from the United States takes subject to such appropriation."

Cook v. *Hewitt*, 4 Wash. 749, and *Rigney* v. *Tacoma Light & W. Co.* 9 Wash. 576, 26 L. R. A. 425, are not from the arid district.

In *Isaacs* v. *Barber*, 10 Wash. 124, 30 L. R. A. 665, it was held that "the right to prior appropriation of water upon the public domain for mining and other beneficial purposes has been established by a custom so universal that courts must take judicial notice thereof."

NOTE.—For rights of prior appropriators of water as affecting the subject of riparian rights, see Isaacs v. Barber (Wash.) 30 L. R. A. 665, and *note*.

The common-law right to running water is that every proprietor of lands on the banks of a river has naturally an equal right to the use of the water which flows in the stream adjacent to his lands, as it was wont to run (*currere solebat*) without diminution or alteration.

3 Kent, Com. *439; *M'Calmont* v. *Whitaker*, 3 Rawle, 84, 23 Am. Dec. 102; *Brown* v. *Bush*, 45 Pa. 66; *Van Hoesen* v. *Coventry*, 10 Barb. 518; *Moffett* v. *Brewer*, 1 G. Greene, 348; *Tillotson* v. *Smith*, 32 N. H. 94, 64 Am. Dec. 355; *Bealey* v. *Shaw*, 6 East, 208; *Davis* v. *Getchell*, 50 Me. 602, 79 Am. Dec. 636.

But in England and in all the older states irrigation was unknown as a reasonable use of running water.

Angell, Watercourses, 7th ed. § 120.

In *Evans* v. *Merriweather*, 4 Ill. 496, 38 Am. Dec. 106, the court says irrigation is by no means essential, and cannot therefore be considered a natural want of man.

The use of water from the lands and running streams by miners and irrigators grew into customary law without legislation, either congressional or local, and valuable properties were created before the act of 1866, the substantial provisions of which act have been placed in the Revised Statutes of the United States as § 2339.

Atchison v. *Peterson*, 87 U. S. 20 Wall. 507, 22 L. ed. 414; *Basey* v. *Gallagher*, 87 U. S. 20 Wall. 670, 22 L. ed. 452; *Forbes* v. *Gracey*, 94 U. S. 762, 24 L. ed. 313; *Jennison* v. *Kirk*, 98 U. S. 453, 25 L. ed. 240; *Broder* v. *Natoma Water & Min. Co.* 101 U. S. 274, 25 L. ed. 790.

This act of Congress merely confirmed and established the customary local law.

The common-law doctrine of riparian rights, that every riparian owner is entitled to the natural flow of the stream through his land as it is wont to run, is not applicable to the streams in Yakima and Kittitas counties, but rights should be determined by the doctrine of prior appropriations.

The common law was made for man, not man for the common law.

The colonists brought with them the common law of England so far as it was applicable to their new conditions.

The common law of England, so far as it is not repugnant to or inconsistent with the Constitution and laws of the United States and the organic act and laws of Washington territory, shall be the rule of decision in all the courts of this territory.

The question whether the use of water in any particular locality is necessary to man's existence is a question of fact, and not of law. *Crandall* v. *Woods*, 8 Cal. 142.

Much of the confusion and uncertainty existing on the water question arises from a failure to distinguish what is law and what is fact in the application of the common law.

Vansickle v. *Haines*, 7 Nev. 249; *Lux* v. *Haggin*, 69 Cal. 255; *Com.* v. *Knowlton*, 2 Mass. 534; *People, Loomis*, v. *Canal Appraisers*, 33 N. Y. 482.

The common-law doctrine of riparian rights is unsuited to the condition of our state, and

this case should have been determined by the application of the principle of prior appropriation.

Reno Smelting, M. & Reduction Works v. *Stevenson*, 20 Nev. 269, 4 L. R. A. 60; *Drake* v. *Earhart*, 2 Idaho, 716; *Stowell* v. *Johnson*, 7 Utah, 215; *Moyer* v. *Preston* (Wyo.) 44 Pac. 845; *Clough* v. *Wing* (Ariz.) 17 Pac. 453; *Trambley* v. *Luterman*, 6 N. M. 15; Black's Pomeroy, Water Rights, § 106.

Legislation confirms the custom of appropriation, and abrogates riparian rights in Yakima county.

Laws 1873, p. 520; Laws 1895–96, 508; Black's Pomeroy, Water Rights, §§ 106–108, 113.

Messrs. **D. J. Crowley** and **Whitson & Parker,** for respondents:

Under the common-law rule the riparian owner might make reasonable use of flowing water for the purpose of irrigation.

Black's Pomeroy, Water Rights, §§ 150, 151, 153, 155, 157; *Lux* v. *Haggin*, 69 Cal. 255; *Jones* v. *Adams*, 19 Nev. 78; *Vansickle* v. *Haines*, 7 Nev. 286; *Union Mill & Min. Co.* v. *Ferris*, 2 Sawy. 199; Washb. Easements & Servitudes, 2d ed. p. 240; *Elliot* v. *Fitchburg R. Co.* 10 Cush. 194, 57 Am. Dec. 85; *Swift* v. *Goodrich*, 70 Cal. 103. See also *Blanchard* v. *Baker*, 8 Me. 253, 23 Am. Dec. 504; *Gillett* v. *Johnson*, 30 Conn. 180; *Farrell* v. *Richards*, 30 N. J. Eq. 511; *Tolle* v. *Correth*, 31 Tex. 362, 98 Am. Dec. 540; *Stanford* v. *Felt*, 71 Cal. 249; *Gould* v. *Stafford*, 77 Cal. 66; *Rhodes* v. *Whitehead*, 27 Tex. 304, 84 Am. Dec. 631; *Anaheim Water Co.* v. *Semitropic Water Co.* (Cal.) 30 Pac. 623.

Water for irrigation in arid countries is a natural want.

Evans v. *Merriweather*, 4 Ill. 492, 38 Am. Dec. 106; Kinney, Irrigation, §§ 157, 158.

The right of appropriation exists so long as the lands are the public lands of the United States; whenever the government parts with its title it grants to its patentee, as an incident, any water flowing over it which had not been appropriated prior to the inception of his title.

Basey v. *Gallagher*, 87 U. S. 20 Wall. 670, 22 L. ed. 452; *Sturr* v. *Beck*, 133 U. S. 541, 33 L. ed. 761; *Union Mill & Min. Co.* v. *Ferris*, 2 Sawy. 176; *Union Mill & Min. Co.* v. *Dangberg*, 2 Sawy. 451.

The history of legislation and constitutional enactment in this state has conclusively recognized the riparian doctrine.

Wash. Const. art. 21; Acts 1889–90, p. 719, §§ 44, 46, 48, 57; 1 Hill's Code, §§ 1761–1763, 1765, 1774, 1737; *Thorpe* v. *Tenem Ditch Co.* 1 Wash. 566; *Isaacs* v. *Barber*, 10 Wash. 133, 30 L. R. A. 665; *Crook* v. *Hewitt*, 4 Wash. 749; *Rigney* v. *Tacoma Light & W. Co.* 9 Wash. 576, 26 L. R. A. 425.

No court where the other view has been taken has ever answered satisfactorily the comprehensive and able arguments contained in *Vansickle* v. *Haines*, 7 Nev. 249.

See also *Lux* v. *Haggin*, 69 Cal. 255; Kinney, Irrigation, §§ 191, 208; Black's Pomeroy, Water Rights, 145, 150, 158; *Crandall* v. *Woods*, 8 Cal. 136; *Lehigh Co.* v. *Independent Ditch Co.* 8 Cal. 323; *Cole* v. *Logan*, 24 Or. 304.

The doctrine of appropriation applies only to public lands.

Gould, Waters, § 240; Black's Pomeroy, Water Rights, § 30; *Curtis* v. *LaGrande Hydraulic Water Co.* 20 Or. 34, 10 L. R. A. 484.

When a patent issues the title relates back to the initiatory act, *viz.*, the date of settlement.

Sturr v. *Beck*, 133 U. S. 541, 33 L. ed. 761; Kinney, Irrigation, § 210; *Shepley* v. *Cowan*, 91 U. S. 337, 23 L. ed. 426; *Stark* v. *Starr*, 73 U. S. 6 Wall. 418, 18 L. ed. 929; *Union Mill & Min. Co.* v. *Dangberg*, 2 Sawy. 450; *Larsen* v. *Oregon R. & Nav. Co.* 19 Or. 240; *Cole* v. *Logan*, 24 Or. 304; *Faull* v. *Cooke*, 19 Or. 455.

Oregon has the same statute substantially as Washington on condemnation of riparian ownership, quoted at § 499, Kinney on Irrigation. That court has steadily maintained the doctrine of riparian ownership.

Oregon Iron Co. v. *Trullenger*, 3 Or. 1; *Taylor* v. *Welch*, 6 Or. 199; *Shively* v. *Hume*, 10 Or. 76.

In Kansas the doctrine of riparian rights is upheld, although the statutes of that state seem to recognize as fully as those of this state the taking of water by appropriation.

Kinney, Irrigation, §§ 427, 442.

In North Dakota the riparian doctrine is recognized.

Kinney, Irrigation, § 467.

So also in South Dakota.

Kinney, Irrigation, § 477.

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

An action was instituted in the superior court of Yakima county by the plaintiff Benton, a riparian proprietor on the Ahtanum river, in said county, to restrain certain of the appellants from diverting the waters of said stream, and conducting the same to and upon their land, situated at a distance therefrom, for the purposes of irrigation. Three separate actions were also commenced by other parties, seeking similar relief, and by stipulation of all the parties, and an order of the court, all of those causes were consolidated and tried in this action. Many riparian owners became parties by intervention, and joined the plaintiffs in claiming the relief sought by them, and the defendants in the several causes were all made defendants in the consolidated case. The complaint in each case, briefly stated, alleges riparian ownership on the part of the plaintiff, and appropriation of the water, and the date thereof, and the use of the water for irrigation, and its diversion by the defendants. Each of the nonriparian landowners alleges ownership of lands, and appropriation and use of the water for irrigation, and date of such appropriation, and the making of valuable improvements on the land. And each party to the action avers that his land, without artificial irrigation, is arid and unproductive, and prays that he may be decreed entitled to a certain specified quantity of water for the purpose of irrigating his premises. The action involves the rights of a multitude of farmers located on the banks of the river, as well as those of a great number of nonriparian landowners. The evidence preserved in the record is exceedingly voluminous, but the facts deduced therefrom and stated by the court are so satisfactory to counsel that we have been relieved of the labor of examining it in detail. Of the ninety-one

findings of fact made by the court, none of any special importance is disputed by counsel for appellants. The trial court awarded a perpetual injunction restraining each and every of the nonriparian owners of land from diverting or interfering with the water of the river. Appellants excepted to the conclusions of law as announced by the court, and to the whole decree, as founded on erroneous conclusions of law, and here insist that the rights of all parties should be determined by this court by the application of the doctrine of appropriation, in accordance with the facts found by the superior court. It may be stated generally that the court found from the evidence the date when each party settled upon his land and took the initiatory step in the acquisition to title thereto, as well as the date at which he appropriated the water for agricultural purposes. While the court recognized the existence in this state of the doctrine of prior appropriation, it nevertheless held that the plaintiff and plaintiff interveners, who settled upon their respective lands, and acquired their title thereto by complying with the laws of the United States, and appropriated and used the water of the stream for irrigation and domestic purposes, prior to the diversion by appellants, were entitled to have the stream continue to flow as it naturally flowed through or by their lands at the time their possessory rights attached. In other words, the court held that the respondents were entitled to the common-law rights of riparian proprietors, as against subsequent appropriators of the water, from the date of their occupancy, with intent to acquire the title of the government in pursuance of law. And this ruling of the trial court was not at variance with the rule repeatedly announced by this court, and the territorial supreme court except upon the question as to the date at which riparian rights become vested in lawful occupants of public land. That such rights, as well as the right of prior appropriation, have hitherto been recognized in the decisions in this state, will be disclosed by an examination of the following cases: *Thorpe* v. *Tenem Ditch Co.* 1 Wash. 566; *Ellis* v. *Pomeroy Improv. Co.* 1 Wash. 572; *Geddis* v. *Parrish*, 1 Wash. 587; *Crook* v. *Hewitt*, 4 Wash. 749; *Rigney* v. *Tacoma Light & W. Co.* 9 Wash. 576, 26 L. R. A. 435; *Isaacs* v. *Barber*, 10 Wash. 124, 30 L. R. A. 665. Nor did the legislature disregard the rights of riparian owners in the general act of 1890 relating to appropriation of water for irrigation. 1 Hill's Code, § 1718 *et seq.* On the contrary, §§ 1761 and 1774 of that act especially recognized the existence of riparian rights, and we do not see anything in that statute or the subsequent act of 1891 evincing an intention on the part of the legislature to disregard such rights.

But it is most earnestly insisted by the learned counsel for appellants that the common-law doctrine touching riparian rights is not applicable to the arid portions of the state, and especially to Yakima county; and this court is now urged to so decide, notwithstanding anything it may heretofore have said to the contrary. The legislature of the territory of Washington in the year 1863 (Laws 1863, p. 68) enacted that "the common law of England, so far as it is not repugnant to, or inconsistent with, the Constitution and laws of the United States and the organic act and laws of Washington territory, shall be the rule of decision in all the courts of this territory." The language of this provision was changed by the state legislature in 1891 by omitting the words "of England," substituting the word "state" for "territory," and inserting the clause, "nor incompatible with the institutions and condition of society in this state." Code Proc. § 108. But the meaning remains substantially the same. It thus appears that the common law must be our "rule of decision," unless this case falls within the exceptions specified in the statute. Now, the common-law doctrine declaratory of riparian rights, as now generally understood by the courts, is not, in our judgment, inconsistent with the Constitution or laws of the United States or of this state. Nor is it incompatible with the condition of society in this state, unless it can be said that the right of an individual to use and enjoy his own property is incompatible with our condition,—a proposition to which, we apprehend, no one would assent for a moment. It is held by practically all the better authorities that the right of the riparian owner to the natural flow of the stream by or across his land in its accustomed channel is an incident to his estate, and passes by a grant of the land, unless specially reserved. It is not an easement in or an appurtenance to the land, but, as Angell says, is as much a part of the soil as the stones scattered over it. Angell, Watercourses, § 5.

"By the common law," says the court in *Lux* v. *Haggin*, 69 Cal. 255, "the right of the riparian proprietor to the flow of the stream is inseparably annexed to the soil, and passes with it, not as an easement or appurtenance, but as part and parcel of it. Use does not create the right, and disuse cannot destroy or suspend it. The right in each extends to the natural and usual flow of all the water, unless where the quantity has been diminished as a consequence of the reasonable application of it by other riparian owners for purposes hereafter to be mentioned." And one of the purposes thereafter mentioned was irrigation. In Washburn on Easements & Servitudes, 4th ed. pp. 316, 317, the learned author says: "The right of enjoying this flow, without disturbance or interruption by any other proprietor is one *jure naturæ*, and is an incident of property in the land, not an appurtenance to it, like the right he has to enjoy the soil itself, in its natural state, unaffected by the tortious acts of a neighboring landowner. It is an inseparable incident to the ownership of land, made by an inflexible rule of law an absolute and fixed right, and can only be lost by grant or twenty years' adverse possession." (In this state, by statute, an adverse possession for ten years would destroy the right.) And the law on this subject is laid down by Prof. Pomeroy in language equally clear and explicit. He says: "The use of the stream, and of the water flowing through it, forms a part of the rights incident to and involved in the ownership of the lands upon its borders. This is the principle recognized by the common law, and which should be recognized by any auxiliary legislation. It is, more-

over, a natural law, an inevitable fact, which no legislation can change. Any statute denying this fact simply attempts an impossibility." Pom. Riparian Rights, § 152.

While the doctrine announced by the foregoing authorities has never, so far as we are advised, been directly denied, it has been apparently ignored by the courts in some of the Pacific states and territories, on the theory that the principles and rules of the common law respecting the rights of private riparian owners were inapplicable to the condition and necessities of the people of the particular localities where the causes of action arose. *Coffin* v. *Left Hand Ditch Co.* 6 Colo. 446; *Drake* v. *Earhart*, 2 Idaho, 716; *Stowell* v. *Johnson*, 7 Utah, 215; *Moyer* v. *Preston* (Wyo.) 44 Pac. 845; *Clough* v. *Wing* (Ariz.) 17 Pac. 453; *Trambley* v. *Luterman*, 6 N. M. 15. But the legislatures of those states and territories have attempted to abolish the common-law doctrine relative to private property in watercourses and to riparian rights generally. Pom. Riparian Rights, § 106. And the decisions above cited are presumably in accordance with the local statutes, though some of them, it appears, were grounded solely on the assumption that the rules of the common law were inapplicable by reason of the aridity of the soil and the consequent necessity for extensive irrigation. But how it can be held that that which is an inseparable incident to the ownership of land in the Atlantic states and the Mississippi valley is not such an incident in this or any other of the Pacific states, we are unable clearly to comprehend. It certainly cannot be true that a difference in climatic conditions or geographical position can operate to deprive one of a right of property vested in him by a well-settled rule of common law. The mere fact that the appellants will not be able to occupy or cultivate their lands as they heretofore have done unless they irrigate them with water taken from the Ahtanum river is no sufficient reason for depriving the respondents, who settled upon that stream in pursuance of the laws of the United States, of the natural rights incident to their more advantageous location. The necessities of one man, or of any number of men, cannot justify the taking of another's property without his consent, and without compensation. If it be true, as claimed by appellants, that, if the judgment of the court below is affirmed, their land will again become a barren waste, and cease to "blossom as the rose," it is equally true that, if the waters of the river are diverted from its channel, the premises of the respondents will become unproductive and utterly worthless. "The aridity of the soil and air being made the test, the greater the aridity the greater the injury done to the riparian proprietors below by the entire diversion of the stream, and the greater the need of the riparian proprietor the stronger the reason for depriving him of the water. It would hardly be a satisfactory reason for depriving riparian lands of all benefit from the flow that they would thereby become utterly unfit for cultivation or pasturage, while much of the water diverted must necessarily be dissipated." McKinstry, J., in *Lux* v. *Haggin*, 69 Cal. 255. The question of the applicability of the common law in controversies respecting water rights in the mineral districts of California was lucidly discussed by Chief Justice Sanderson in *Hill* v. *Smith*, 27 Cal., at page 482. With reference to the charge of the trial court, which seemed to be based on an erroneous view of the law with respect to the rights of miners and ditch owners using the water of a stream for mining purposes, the learned chief justice said: "This is due in a great measure, doubtless, to the notion, which has become quite prevalent, that the rules of the common law touching water rights have been materially modified in this state, upon the theory that they were inapplicable to the conditions found to exist here, and therefore inadequate to a just and fair determination of controversies touching such rights. This notion is without any substantial foundation. The reasons which constitute the groundwork of the common law upon this subject remain undisturbed. The conditions to which we are called upon to apply them are changed, and not the rules themselves. The maxim, *Sic utere tuo, ut alienum non lædas*, upon which they are grounded, has lost none of its governing force; on the contrary, it remains now, and in the mining regions of this state, as operative a test of the lawful use of water as at any time in the past, or in any other country. When the law declares that a riparian proprietor is entitled to have the water of a stream flow in its natural channel,—*ubi currere solebat*,—without diminution or alteration, it does so because its flow imparts fertility to his land, and because water in its pure state is indispensable for domestic uses. But this rule is not applicable to miners and ditch owners, simply because the conditions upon which it is founded did not exist in their case. They seek the water for a particular purpose, which is not only compatible with its diversion from its natural channel, but more frequently necessitates such diversion, and moreover does not require the water in a pure state in order to insure its reasonable and beneficial use." In *Atchison* v. *Peterson*, 87 U. S. 20 Wall. 507, 22 L. ed. 414, the Supreme Court of the United States stated, as claimed by appellants, that, as respects the use of water for mining purposes, the doctrines of the common law declaratory of the rights of riparian owners were, at an early day after the discovery of gold, found to be inapplicable, or applicable only in a very limited extent, to the necessities of miners, and inadequate to their protection. That action was brought by parties who were ditch owners, for an injunction to restrain the defendants from carrying on certain mining operations on Ten-Mile creek, in Montana, and the question of riparian rights does not seem to have been involved therein. In fact, in the course of the opinion it is observed that "the government being the sole proprietor of all the public lands, whether bordering on streams or otherwise, there was no occasion for the application of the common-law doctrine of riparian proprietorship in respect to the waters of those streams,"—meaning the streams on the public lands, the waters of which were subject to appropriation and use under the customs obtaining among miners. In *Basey* v. *Gallagher*, 87 U. S. 20 Wall. 670, 22 L. ed. 452, the question on the merits in the case, as stated by the court, was whether a right

to running waters on public land of the United States for the purposes of irrigation could be acquired by prior appropriation, as against parties not having the title of the government, and the court held that it could. But the question of riparian rights was not in the case, and the court said that "neither party has any title from the United States; no question as to the rights of riparian proprietors can therefore arise. It will be time enough to consider those rights when either of the parties has obtained a patent of the government. At present both parties stand upon the same footing; neither can allege that the other is a trespasser against the government without at the same time invalidating his own claim." But in the later case of *Sturr* v. *Beck*, 133 U.S. 541, 33 L. ed. 761, the question as to the rights of the riparian proprietor as against an appropriator of the water did arise, and was determined by the court. The facts were that one John Smith settled on a tract of government land in the territory of Dakota in March, 1877, and continued to reside thereon until he sold and conveyed it by warranty deed to one Beck. He made his homestead application or entry on March 25, 1879, and his final proof May 10, 1883, and received a patent from the United States. The waters of a certain creek flowed in its natural channel across Smith's homestead, and in May, 1880, Sturr went upon that homestead, located a water right thereon, and constructed a ditch by which the waters of the creek were diverted to his own land. Beck went into possession under his deed from Smith, and in 1886 notified Sturr to cease diverting the water and maintaining the ditch, whereupon Sturr commenced an action to enjoin Beck from interfering with his alleged water right and ditch, and the use of the water of the creek. Sturr claimed the right to divert and use the waters of the stream for the purposes of irrigation by virtue of a prior appropriation, and Beck defended and asked affirmative relief on the ground of riparian ownership. It will thus be seen that the question there raised was identically the same as that which is presented for determination here. In that case it appeared that neither Smith nor his grantee, Beck, had ever diverted the waters of the creek from the natural channel prior to the location of the alleged water right by Sturr; but the court unanimously held that Smith's patent related back to the date of his homestead filing, and cut off completely the alleged claim of Sturr. The learned chief justice, in delivering the opinion of the court, after referring to the act of Congress of July 26, 1866 (Rev. Stat. § 2339), and the amendatory act of 1870, and quoting from the opinion in *Atchison* v. *Peterson*, 87 U. S. 20 Wall. 507, 22 L. ed. 414, said: "When, however, the government ceases to be the sole proprietor, the right of the riparian owner attaches, and cannot be subsequently invaded. As the riparian owner has the right to have the water flow *ut currere solebat*, undiminished except by reasonable consumption of upper proprietors, and no subsequent attempt to take the water only can override the prior appropriation of both land and water, it would seem reasonable that lawful riparian occupancy with intent to appropriate the land should have the same effect." And after quoting certain sections of the Civil Code of Dakota, and setting out the local custom of diverting and appropriating the waters of flowing streams for the purpose of irrigation, he concluded the opinion in the following language: "The question is not as to the extent of Smith's interest in the homestead as against the government, but whether, as against Sturr, his lawful occupancy under settlement and entry was not a prior appropriation which Sturr could not displace. We have no doubt it was, and agree with the brief and comprehensive opinion of the Supreme Court to that effect." It seems to us that the soundness of that decision can scarcely be doubted. While the court fully recognized the doctrine of prior appropriation of water on the public lands, in accordance with the local customs, laws, and decisions of courts, it announced and established the just and equitable rule that the riparian rights of a patentee of the government attach, by relation, at the very inception of his title, and will be protected as against subsequent appropriation of the water naturally flowing over the land. That case, it would seem, settles the law adversely to the contention of the appellants in this case. The doctrine that the rights of a patentee or grantee of the government relate back to the first act of the settler necessary in the proceedings to acquire title is also announced in the following cases: *Shepley* v. *Cowan*, 91 U. S. 330, 23 L. ed. 424; *Larsen* v. *Oregon R. & Nav. Co.* 19 Or. 240; *Fault* v. *Cooke*, 19 Or. 455. See, also Kinney, Irrigation, § 210; *Union Mill & Min. Co.* v. *Dangberg*, 2 Sawy. 450.

The trial court in this case followed the rule laid down in the case of *Sturr* v. *Beck*, and other cases above referred to, and, in so doing, we think committed no error. But it is claimed by appellants that the act of the territorial legislature entitled "An Act Regulating Irrigation and Water Rights in the County of Yakima, Washington Territory" (Laws 1873, p. 520), fully authorized them to divert and use the waters of the Ahtanum river as they had done. It is perhaps sufficient to say with reference to that act that the rights of many of the respondents who own riparian lands had attached, under the law as announced in the *Sturr Case*, prior to its passage, and were therefore in no wise affected by it. And besides by the first section of that act the respondents were entitled to the use of the water for the purpose of irrigating their lands "to the full extent of the soil thereof." Moreover, the doctrine of appropriation applies only to public lands, and when such lands cease to be public, and become private, property it is no longer applicable. Gould, Waters, § 240; Pom. Riparian Rights, § 30; *Curtis* v. *La Grande Hydraulic Water Co.* 20 Or. 34, 10 L. R. A. 484. It was for the purpose of protecting the rights of appriators of water for beneficial uses on the public lands which had vested and accrued, by virtue of local customs, laws, and decisions of the courts, that the 9th section of the act of Congress of July 26, 1866, the substance of which is included in § 2339 of the Revised Statutes, was enacted. It was apparent to Congress, and, indeed, to everyone, that neither local customs nor state laws or decisions of state courts could vest the title to public

land or water in private individuals without the sanction of the owner, *viz.*, the United States. The government, being the sole proprietor, had the right to permit the water to be taken and diverted from its riparian lands; but, when it disposed of land without reserving the water, the latter passed to its grantee free from interference thereafter by the grantor. "The object of the section [Rev. Stat. § 2339] was to give the sanction of the United States, the proprietor of the lands, to possessory rights, which had previously rested solely upon the local customs, laws, and decisions of the courts, and to prevent such rights from being lost on a sale of the lands." *Jennison* v. *Kirk*, 98 U. S. 456, 457, 25 L. ed. 241, 242.

It is suggested on behalf of the appellants that the use of water for irrigation was practically unknown to the common law. But, while it may be true that it is seldom necessary or desirable to irrigate land in England by artificial means, yet it appears that a reasonable use of running streams for that purpose by riparian proprietors is recognized by the courts of that country. It is expressly so stated in Gould on Waters (§ 217), where a number of English cases are cited; and in Pomeroy on Riparian Rights (§ 125) it is declared that the common-law rule that every riparian proprietor has an equal right to the use of water as it is accustomed to flow, without diminution or alteration, is subject to the well-recognized limitation that each owner may make a reasonable use of the water for domestic, agricultural, and manufacturing purposes; and the author there cites several English and many American decisions in support of that declaration. See also 2 Washb. Real Prop. 5th ed. pp. 367, 368; Gould, Waters, § 205; *Lux* v. *Haggin*, 69 Cal. 255, and cases cited; *Union Mill & Min. Co.* v. *Ferris*, 2 Sawy. 177.

A careful consideration of all the questions raised on this appeal discloses no error and *the judgment is therefore affirmed.*

Scott, Ch. J., and **Gordon, J.**, concur. **Dunbar** and **Reavis,** JJ., being disqualified, did not sit in this case.

Rehearing denied.

ILLINOIS SUPREME COURT.

Theodore] P. SIDDALL, Jr., by Next Friend, *Appt.*,
v.
Egbert L. JANSEN *et al.*

(168 Ill. 43.)

1. **The facts may be reviewed by the supreme court** of Illinois to the extent of ascertaining whether or not there was such evidence tending to establish plaintiff's declaration as should have been submitted to the jury, where error is assigned to the giving or refusal of an instruction to find for the defendant.
2. **An ascending and descending cage of an elevator is such an attraction to children** that an unguarded or open door, or one which may readily be opened from the outside, may constitute negligence on the part of the owner when children are allowed to play where they may be injured by it.
3. **Failure to comply with the provisions of an ordinance** respecting the doors of elevators will render the owner liable for an injury received in consequence by a child which was rightfully at the place of the injury.
4. **Whether a child five years of age is a trespasser** or not when playing near an elevator in a store, used by employees and reached through open doors from the main floor of the store in which the father of the child was employed, is a question for the jury, if the child was rightfully in the store by invitation of the father.

(November 1, 1897.)

APPEAL by plaintiff from a judgment of the Appellate Court, First District, affirming a judgment of the Superior Court for Cook County in favor of defendants in an action brought to recover damages for personal injuries alleged to have been caused by defendants' negligence. *Reversed.*

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

This was an action brought by Theodore P. Siddall, Jr., by his next friend, against Egbert L Jansen and others, composing the firm of Jansen, McClurg, & Co., wholesale and retail booksellers and stationers, in Chicago, to recover damages for an injury received by being struck by a descending elevator of the defendants. The father of plaintiff was an employee of defendants, and the plaintiff, then about five years of age, was playing around the store. In the temporary absence of the parent the child was attracted to an elevator shaft, the door of which was unfastened, and was severely bruised and mangled by the descending cage. The negligence alleged in the declaration charges the defendants with negligently permitting to continue open and unguarded the doorway of the elevator shaft, and the partitioned inclosure surrounding it, and in failing to place fastenings upon the elevator door, so they could be opened only from the inside, and thus be under the entire control of the elevator operator, as is provided by a city ordinance of Chicago. A judgment for $10,000, rendered November 15, 1889, was reversed by the appellate court (41 Ill. App. 279), and on appeal here the judgment of the appellate court was reversed, with directions to find facts, or remand the case (143 Ill. 537). The appellate court remanded the

NOTE.—As to liability for maintaining dangerous attractions for children, see Missouri, K. & T. R. Co. v. Edwards (Tex.) 32 L. R. A. 825, and other cases cited in *footnote* thereto; also some cases in *note* to Chicago City R. Co. v. Robinson (Ill.) 4 L. R. A. 127. See also Moran v. Pullman Palace Car Co. (Mo.) 33 L. R. A. 755, and cases there cited.