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THE MAGAZINE. With this issue THE LAW REGISTER appears in a new cover. In order to preserve uniformity in the bound volume, other changes, designed to improve the appearance of the magazine, are postponed till the beginning of the year. An effort will be made to furnish correspondingly improved reading matter, with respect both to articles of permanent value to the profession, and to important questions of contemporary legal interest. Attention is directed also to the change of address to which business communications should be sent, and to the reduced subscription price. The latter change has been in contemplation for some time, and is one which we are glad to be able at last to make in order to ensure a wider circulation. As an added inducement to new subscribers, all subscriptions received at any time before the close of the year, and paid for in advance, will be dated from January 1, 1897.

CERTIFICATION BY SECRETARY OF STATE OF NOMINATIONS UNDER THE "AUSTRALIAN BALLOT LAWS." In the recent case of *Phelps* v. *Piper* [AMERICAN LAW REGISTER AND REVIEW, 1896, p. 523], the Supreme Court of Nebraska has followed the general trend of the decisions thus far rendered, that the Secretary of State will not decide which of two rival conventions of the same organization is

the regular one. In the case in question the facts briefly were that two conventions had met and made nominations for state offices, which nominations had been certified in due form to the Secretary of State. Both sets of nominations were under the same party name, wherein arose the contention.

The court held that the question in such instance, which faction is the true representative of the party organization, is political rather than judicial, and that *all* such nominations should be recertified to the county clerks. This ruling is supported by *State* v. *Allen*, 43 Neb. 651, 62 N. W. Rep. 35; *People* v. *District Court*, 18 Colo. 26, 31 Pac. Rep. 339; *Shields* v. *Jacob*, 88 Mich. 164, 50 N. W. Rep. 105. It appears that the decision of such a case is one for the people. The court said: "The legislature has not provided any means for determining such controversies. [It is a question whether the legislature has such power.] Political parties are voluntary associations for political purposes. They establish their own rules. They are governed by their own usages. Voters may form them, reorganize them, and dissolve them at their will. The voters ultimately must determine every such question. The voters constituting a party are, indeed, the only body who can finally determine between contending factions or contending organizations. The question is one essentially political, and not judicial in its character. It would be alike dangerous to the freedom of elections, the liberty of voters, and to the dignity and respect which should be entertained for judicial tribunals, for the courts to undertake in any case to investigate either the government, usages, or doctrines of political parties, and to exclude from the official ballots the names of candidates placed in nomination by an organization which a portion or, perhaps, a large majority, of the voters professing allegiance to the particular party believe to be the representatives of its political doctrines, and its party government." See the late case of *People* v. *Lauterbach*, 39 N. Y. Suppl. 1119, AM. LAW. REG. & REV., 1896, p. 578. The above cases rule where the nominations have been certified and no objections made to the certificates within the specified times. Courts will by no means, however, pass over fraud and unfairness in the conduct of caucuses and conventions.

LIABILITY OF A PUBLIC TREASURER FOR MONEYS LOST WITHOUT NEGLIGENCE ON HIS PART. The reports for the past few months contain several cases which add to the conflict of opinion already existing upon this question. Do the statutes creating the office and prescribing the duties thereof, together with the official bond required of the officer, increase the common law liability of the treasurer as a bailee for hire and make him an insurer against loss not occasioned by the act of God or of the public enemy?

The question first arose in *United States* v. *Prescott*, 3 How. 589 (1845). The question certified to the Supreme Court of the United States by the evenly divided Circuit Court for Illinois, was "Does

the felonious stealing of public moneys in the custody of a receiver of public moneys without fault . . . . on his part, discharge him and his sureties, and is that a good and valid defence on his official bond?" The court, speaking by McLean, J., answered the question in the negative, saying "The liability of the defendant, Prescott, arises out of his official bond, and upon principles which are founded upon public policy." And again, "Public policy requires that every depositary of the public money should be held to strict accountability. Not only should he exercise the highest degree of vigilance but 'he should keep safely' the moneys which come to his hands." Taney, C. J., Story, Nelson and Swayne, JJ., took part in this decision. The doctrine of strict accountability has not been departed from by the Supreme Court of the United States, as some have supposed; for in *United States* v. *Thomas*, 15 Wall. 345 (1872), the majority of the court, by Mr. Justice Bradley, say that such is the policy of the Acts of Congress. In placing the liability of such officers, Mr. Justice Bradley said, "They are special bailees, subject to special obligation. It is obvious that the ordinary law of bailment cannot be invoked to determine the degree of their responsibility. This is placed on a new basis. To the extent of their official bonds, it is fixed by special contract." From this opinion Mr. Justice Miller strongly dissented. In an early Pennsylvania case, *Com.* v. *Comly*, 3 Pa. St. 372 (1846), Mr. Chief Justice Gibson used the following language in reversing the judgment appealed from: "The responsibility of a public receiver is determined not by the law of bailment, which is called in to supply the place of a special agreement where there is none, but by the condition of his bond. The condition of it in this instance was 'to account for and pay over' the moneys to be received, and we look in vain for a power to relieve him from the performance of it." This case has been repeatedly followed in Pennsylvania: *Baily* v. *Com.*, 20 W. N. C. 221; *Nason* v. *Directors*, 24 W. N. C., 60 (1889).

Of the cases recently reported, *State* v. *Copeland*, 34 S. W. (Tenn.) 427 (1896), where money was lost by the failure of a bank, and *City* v. *Mulligan*, 45 Pac. (Cal.) 337 (1896), where a city treasurer was robbed, hold that where the officer is free from fault, proof of these facts will constitute a valid defence; while in *Fairchild* v. *Hedges*, 44 Pac. (Wash.) 125 (1896), it was held that the officer was liable for the safety of the public moneys even though he was not negligent. In this case and in *Board* v. *Jewel*, 44 Minn. 427, 46 N. W. 914, the authorities for both views will be found, the great weight of opinion, however, favoring the doctrine of strict accountability.

LATERAL SUPPORT OF LAND. *Cabot* v. *Kingman*, 44 N. E. Rep. 344; Supreme Judicial Court of Mass. This case, which was noticed in the August issue of this magazine under Progress of the Law, presents an interesting point for discussion, namely, whether

where the strata of certain soil are of a liquid nature such soil is entitled to support by the adjacent land. A city built a sewer in a public street opposite the plaintiff's premises. Extending under both the street and the plaintiff's land was a stratum of silt, and fine sand mixed with water, or quicksand. The sewer trench was kept free of water by means of buckets and pumps, which at the same time removed large quantities of the quicksand that flowed in from beneath the plaintiff's soil; this deprived the surface of the necessary support and caused it to crack and sink, damaging the plaintiff's houses thereon.

The court held the city liable in damages, for depriving the plaintiff of the lateral support to his land, in consequence of which the quicksand flowed out and the surface soil sank; and said it was the duty of the defendants to prevent this. But how they could possibly have prevented it, is not apparent.

Three justices dissented from this decision, on the authority of *Popplewell* v. *Hodkinson*, 4 L. R. Exch. 248; which decides that there is no common law right to the support of land by subterranean water; and that no damages can be recovered for the sinking of land so supported, resulting from excavations and drainage in adjoining lands. They argued that a quicksand, flowing so freely as to be raised by a pump, ought to come within the application of this rule regarding percolating water, and that its drainage by the defendants' sewer-trench was no wrong.

It is submitted that this view is the more sound on principle The right to the support of land by adjoining tracts "stands on natural justice, and is essential to the protection and enjoyment of property in the soil. Although it places a restraint on what a man may do with his own property, it is in accordance with the precept, "*sic utere tuos ut alienum non laedas:*" *Humphries* v. *Brogden*, 12 A. & E. n. s. 743. But when this right becomes injustice to the owners of adjoining lands by imposing upon them unreasonable restrictions, and leads to practical confiscation of their property for my private benefit, it should cease. It is intended simply to prevent an owner of land from excavating it so close to the boundaries of adjoining estates as to cause them to cave in: "If the neighboring owners might excavate their soil on every side up to the boundary line to an indefinite depth, land thus deprived of support on all sides could not stand by its own coherence alone:" *Gale on Easements*, 216. But it should not operate to prevent all excavation by the owner upon penalty of heavy damages to his neighbors. Yet this is a direct result of the decision under consideration; for, in cases like *Popplewell* v. *Hodkinson*, no matter on what part of the land the excavation were made, and in cases like the present, however carefully the trench be shored up, it would certainly displace the liquid stratum of the adjoining land and render the excavator liable in damages. For these reasons, we think the rule stated in *Popplewell* v. *Hodkinson* should have been applied to the present case; and that the right of the owner of

land to lateral support should not extend to liquid strata beneath that land.

INDORSEMENT OF DRAFT TO FICTITIOUS INDORSEE. In an unusually well considered opinion upon the effect of an indorsement of a draft to a fictitious person when the indorser is ignorant of the fictitious character of the indorsee or payee, the Supreme Court of Tenn., per Beard, J., in *Chism* v. *First Nat. Bank*, 36 S. W. 387, 43 Cent. L. J. 192 (1896), after referring to Mr. Randolph's adverse criticism of Mr. Daniel's statement of the rule, properly concludes in the language of O'Brien, J., in the leading case of *Shipman* v. *Bank*, 126 N. Y. 318, 27 N. E. Rep. 371, that "the maker's intention is the controlling consideration which determines the character of such paper. It cannot be treated as payable to bearer unless the maker knows the payee to be fictitious and actually intends to make the paper payable to a fictitious person."

Chism, the plaintiff, indorsed a draft to one Hamilton, a fictitious person, but supposing him to be real; a third person fraudulently indorsed the name of this fictitious indorsee and collected the draft from the defendant bank. Chism sued the bank for the face of the draft, on the ground that it had been paid to one who derived title through a forged endorsement, and was met with the defence that the endorsement to a fictitious person was in law an indorsement to bearer, and that therefore the payment to the holder without notice discharged the drawee.

The question has rarely arisen in the American courts. In *Kohn* v. *Watkins*, 26 Kan. 691, the court, relying on the rule as stated by Daniel, decided in favor of the contention of the present defendants. In England the plaintiff in such case is permitted to recover. The courts of New York and Ohio have adopted the English rule: *Shipman* v. *Bank* (*supra*); *Armstrong* v. *Baker*, 46 O. St. 512, 22 N. E. Rep. 866; and Tennessee has now followed these courts.

It is obvious that the conclusion of the court is correct and consistent with the law of negotiable paper, for the banker is liable to the maker if he pays to any one who derives title through a forged indorsement. "Then," as the court says, "in a case where the drawer has been guilty of no wrong, but innocently issues or indorses his check or bill to a person believing him to be real, and a third party, without authority, writes the name of this fictitious payee or indorsee upon it, and by this fraud succeeds in collecting it, why should the drawee, by payment of such indorsement, discharge himself from liability to the drawer?"

The distinction maintained by the English cases is the true one; when the drawer makes his bill payable to a fictitious payee with knowledge, his bill is in law payable to bearer; but where the payee or indorsee is a fictitious person, and this fact is not known to the maker or indorser, the latter is not estopped even as against a *bona fide* holder. See Byles on Bills, 149, n. 6.

CONSTRUCTION OF WILL—LIFE ESTATE—POWER OF DISPOSAL. The question as to whether a devise of an estate generally, coupled with a power of disposal, passes a fee or only a life estate, has once more been the subject of judicial interpretation by the Supreme Court of Connecticut in the case of *Mansfield* v. *Shelton*, 35 Atlantic Reporter, 271. The provisions of the will, which came up for construction in the case, were as follows: "All the rest and residue of my estate, both real and personal and wherever situated, I give, devise and bequeath to my said wife, to be used and appropriated by her, as much as she may wish for her happiness, without any restrictions or limitations whatsoever," followed by a clause that after the death of the wife, and the payment of her debts, and the settlement of her estate, whatever property should remain should pass to a trustee for final distribution as directed. The court decided that only a life estate vested in the widow of the testator, and in arriving at the conclusion discussed in an extended opinion a great many authorities on the subject.

From an examination of these cases several conclusions can be deduced as to the exact status of the law:

1. That where a primary gift conveys and vests in the first taker an absolute interest in personal, or an absolute fee simple in real, property, it exhausts the entire estate so that there can be no valid remainder.

2. That where a life estate is expressly created, it will not be converted into a fee, absolute or qualified, or into another form of estate greater than a life estate, merely by reason of there being coupled with it a power of disposition, however general or extensive.

3. Though an express gift in fee will not be reduced to a life estate by mere implication from a subsequent gift over, it may be so reduced by subsequent language clearly indicating intent and equivalent to a positive provision.

4. Under these limitations, and at times apparently infringing upon them, the intention of the testator as ascertained from the instrument, and, where necessary, by careful extrinsic evidence, governs the interpretation of such provisions.

An example of the first of these principles is the case of *Methodist Church* v. *Harris*, 62 Conn. 93 (1892). In that case the testator bequeathed his property to his wife "and her heirs forever, and after her death such of it as might remain to the Methodist Church," and in deciding that the widow took the estate absolutely the court said that the testator had made a bold attempt to limit a fee upon a fee which the court would not allow.

The case of *Lewis* v. *Palmer*, 46 Conn. 454 (1880), aptly illustrates the second of these principles. In that case a testator gave "to his sister S., the use of all the rest of his real estate during her natural life and for her to dispose of it as she may think proper or just. The language of the court was as follows: "While, as a rule, the gift or devise of property generally, with power to

to sell, and no subsequent limitation carries an estate in fee, nevertheless, there is no case where a life estate expressly created was enlarged to a fee by a power of sale. There are cases where there is an apparent life estate with power of disposal, without any disposition of the remainder, in which it is held that the devisee takes a fee. There are other cases where there is a devise of an estate generally, with an express power to sell, in which it is held that the devise over of the remainder is void for repugnancy. But we think none of the cases go so far as to disregard the obvious and acknowledged intention of the testator. All regard that, when discovered, as conclusive."

In *Glover* v. *Stillson*, 56 Conn. 316 (1889), the devise was "to P. and M., for the term of their natural lives, with power to dispose of any portion of the estate, if they might so desire," and after their decease a part of the property was to go to certain relatives and the remainder to an orphan asylum. The court held that to enlarge the life estate into a fee, simply because a power of sale was appended, would be to subvert the intention of the testator to a mere artificial canon of construction. In *Peckham* v. *Lego*, 57 Conn. 553, (1890), a will gave to W. and his wife the use and improvement of certain real estate during their natural lives, with the further provisions that should it be necessary for their personal comfort to use any portion of said property, it is my will that they should do so exercising good judgment, and saving as much as possible for the children born to them. The court held that the estate taken was only for life.

In *Sill* v. *White*, 62 Conn. 430, (1890), in which the testatrix gave to A. all her property for life, with a right to use whatever was necessary for his support, and the remainder over, the life estate was not enlarged into a fee, the court saying there was no rule of law which converted a life estate, expressly created, into a fee absolute or qualified, or into any other form of estate greater than a life estate, by reason of there being coupled with it a power of sale.

The case of *Smith* v. *Bell*, 6 Peters 68, (1843), in the United States Supreme Court, the opinion being by Chief Justice Marshall, is a good illustration of the third of these principles. The provisions of the will was as follows: "I give to my wife all my personal estate, wherever and whatsoever, and of what nature and kind soever, after payment of my debts, legacies, and funeral expenses, which personal state I give and bequeath unto my said wife Elizabeth Goodwin, to and for her own use and disposal absolutely," the remainder after her decease to be for the use of Jesse Goodwin, the son of the testator. Held, that the wife took a life estate and the son a vested remainder in the personalty.

The decision was vested on the ground that the intention of the testator was to make a present provision for his wife, and a future provision for his son.

In *Chase* v. *Ladd*, 153 Mass. 126 (1891) the testator devised all his property to his wife, to her own use and behoof forever, but

provided that if any of such property should not be expended for her support and maintenance during her lifetime, it should be disposed of in the manner designated in the will. The court decided that, such a provision only vested a life estate in the wife. The case shows that although almost unlimited control may be given over property, it does not vest a fee simple.

The courts in deciding all these cases have always used the intention of the testator as the polar star to direct their interpretation. But none of the cases so decided, except the last, correspond in any great degree with the case under discussion. In the present case there is no express limitation of a life estate. Neither is there any express grant of a fee, as in *Church* v. *Harris, supra*. Following the language of the devise up the words "to be used and appropriated by her," the effect is undoubtedly to give an absolute estate. But, when the testator adds "as much as she may wish for her happiness,"—the intention to limit the grant to a life estate begins to manifest itself, and the subsequent words of the will only make that intent more clear.

Accordingly the decision seems to be in accord with the established principles governing such cases.

CONSTITUTIONAL LAW. The Supreme Court of the United States has recently decided, in the case of *Plessy* v. *Ferguson*, 163 U. S. 537 (1896), that legislative provision, by a state, requiring for its colored citizens separate railroad cars, in which they are compelled to travel, under pain of fine and imprisonment, is constitutional and valid.

The case arose out of a statute of Louisiana, enacted in 1890, compelling companies to provide separate cars or compartments for colored and white persons, and making it a criminal offence for the officers of the railroad companies to fail to show persons into the car intended for their respective races, or for such persons to go into a car other than that designated by the official of the company.

The plaintiff, a colored man, appealed from the criminal district court, where he was about to be sentenced for a breach of the statute, on the ground that it is inconsistent with the Thirteenth and Fourteenth Amendments to the Constitution of the United States.

The case is rendered the more interesting, as the question has never been before the court precisely in this form.

The court gives but slight consideration to the bearing of the Thirteenth Amendment on the case, for the reason that it merely abolished involuntary servitude, and the fact of a person's having to ride in a separate, but equally comfortable car, is not servitude in any sense. Mr. Justice Harlan, however, feels that even this constitutes a "badge of slavery," and, hence, is inconsistent with the amendment.

But it is on the Fourteenth Amendment that the plaintiff chiefly relies. This amendment provides that "no state shall make or enforce any law, which shall abridge the privileges or immunities

of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law."

With this amendment in view, the court decides the case on two broad principles. The first is that while the constitution contemplates equality before the law, it cannot create social equality for two races radically different. By social equality is meant the placing them on the same footing, and regulating to that end their actions, in the casual and natural relations of the two races. The court justly says that any such equality must grow out of a commingling of the two races prompted by a mutual appreciation of each others' worth.

That the constitution recognizes legal equality, witness the frequent decisions that statutes, limiting to white males the privilege of sitting upon juries, are unconstitutional, as stamping the negro with a legal inferiority in civil society, and as a step towards reducing him to a state of slavery: *Ex parte Virginia*, 100 U. S. 313 (1879); *Neal* v. *Delaware*, 103 U. S. 370 (1880); *Gibson* v. *Miss.*, 162 U. S. 565 (1896).

On the other hand, as illustrative of social questions, with which the constitution has nothing to do, take the long line of cases deciding that a state has the power, under the constitution, to establish separate schools for white and black children, and to compel the races either to attend their own schools or remain without school privileges. The cases hold that the colored children are entitled to equal privileges with the white, but not to identical privileges. This has been repeatedly decided by the state courts: *State, Garnes* v. *McCann*, 21 Ohio St. 210 (1871): *Schew* v. *Brummell*, 103 Mo. 546 (1890); *Ward* v. *Flood*, 48 Cal. 36 (1874); *People* v. *Gallagher*, 93 N. Y. 438 (1883); *Dawson* v. *Lee*, 83 Ky. 49 (1885).

It will be asked, if these rights arising out of civil, as distinguished from legal relations, are not within the purview of the constitution, how are they to be adjusted. Here the court lays down its second determining principle, viz.: that the Fourteenth Amendment draws a distinction between citizenship of the United States (*Slaughter House Cases*, 16 Wall. 36 (1872)), and citizenship of the states, and that the former rights are those of citizens of the states, and hence are to be regulated by the legislature in the exercise of its police power.

The dissenting opinion, however, ridicules this view, holding that if this were the case, there would remain no means by which the courts could reach the most violent abuses which may be sanctioned by the legislatures. The reply is that the police power is founded on the *reasonable* provision for the health, good order, and convenience of society, and that the moment the legislature goes beyond the bounds of reasonableness, the courts may take a hand to stop the abuse. Mr. Justice Harlan contends, very rightly, that a

court cannot set aside a statute because impolitic or unreasonable, but only because unconstitutional, but he fails to notice the fact as stated by the majority, that the moment a police regulation becomes unreasonable, it is *ipso facto* unconstitutional, and therefore, has always been recognized that the courts have a corrective power over ill-directed policing by the legislature: *H. & St. J. R. Co.* v. *Husen*, 95 U. S. 465 (1877); *L. & N. R. Co.* v. *Ky.*, 161 U. S. 677 (1896); *Hulseman* v. *Rems*, 41 Pa. 396 (1861).

The court thus leaves the way open for correcting any abuses that may arise, while at the same time it distinctly holds that the constitution deals not with the social and civil standing of citizens, but with their rights before the law. It is difficult to see how the court could have held otherwise, after its definition of citizenship in the Slaughter House Cases (*supra*). The action in this case is certainly consistent with the rulings of the state courts on analogous questions, and involves the principle that the court cannot read into a constitutional provision ideas which are not expressed. The decision cannot have the bad effects prophesied for it by Mr. Justice Harlan, who believes it as iniquitous as the *Dred Scott Decision*, but, we believe, except for the single definite point at issue, leaves the question of the civil rights and status of the negro in general still to be determined.

VENDOR'S LIEN FOR PURCHASE MONEY. A recent case in the Supreme Court of Oregon, *Frame* v. *Sliter*, 45 Pac. Rep. 290, decides that where real estate is granted by absolute deed, followed by delivery of possession to the grantee, no implied equitable lien for the unpaid purchase money remains in the grantor.

"No other single topic belonging to the equity jurisprudence has occasioned such a diversity and even discord of opinion among the American courts as this of the grantor's lien. Upon nearly every question that has arisen as to its operation, its waiver or discharge, the parties against whom it avails, and the parties in whose favor it exists, the decisions in the different states and even sometimes in the same state, are directly conflicting: 3 Pom. Eq. Jur. §1251.

Mr. Bispham in his "Principles of Equity," 5th ed. § 353, arranges the states into three classes, first, those that following the leading English case of *Machreth* v. *Symmons*, 15 Vesey, 329, 1 Lead. Cases Eq. 447 (4th Am. Ed.), hold that "where a vendor delivers possession of an estate to a purchaser, without receiving the purchase money, equity, whether the estate be conveyed or only contracted to be conveyed, and although there was not any special agreement for that purpose, gives the vendor a lien upon the land for the unpaid purchase money;" second, those in which the doctrine has been repudiated; third, those in which the doctrine has been displaced by statute. An examination of these classes will show that, so far as numerical authority is concerned, they stand in the order named. In the second class will be found among others, Massachusetts and Pennsylvania.

In *Bayley* v. *Greenleaf*, 7 Wheaton, 46, Marshall, C. J., impliedly admitted that a lien existed when he said: "That a vendor who has taken no other security for the purchase money, retains a lien for it on the land as against the vendee or his heirs, seems to be well settled by the English decisions." But this must be treated as a dictum, because the question at bar was whether the lien would prevail against a *bona fide* purchaser without notice, and the learned Chief Justice decided that it would not, and, further, took occasion to criticize the lien for being "a secret invisible trust." However, all doubt as to the position of the Federal courts has been removed by the case of *Fisher* v. *Shopshire*, 13 Sup. Ct. Rep. 201, in which Chief Justice Fuller says: "The courts of the United States enforce grantors' and vendors' liens if in harmony with the jurisprudence of the state in which the action is brought, and the principle upon which such a lien rests has been held to be that one who gets the estate of another ought not, in conscience, to be allowed to keep it without paying the consideration:" *Chilton* v. *Braiden's Admx.*, 2 Black, 458; See also *Bush* v. *Marshall*, 6 Howard, 284; *Cordova* v. *Hood*, 17 Wallace, 5; *Rice* v. *Rice*, 36 Fed. Rep. 860.

The Pennsylvania law upon the subject is found in the case of *Kauffelt* v. *Bower*, 7 S. & R. 64, together with the later cases of *Neas's Appeal*, 31 Pa. 293; *Heister* v. *Green*, 48 Pa. 96, and *Heist* v. *Baker*, 49 Pa. 9. In the first mentioned case, Gibson, J., used the following language: "The decision of the principal question whether an equitable lien for purchase money can exist in Pennsylvania, under any circumstances, will render a decision of most of, if not all, other questions raised, unnecessary. I have given this question that deliberate consideration which the great importance of its practical consequences deserves, and the result is a settled conviction that, with us, such a lien does not exist."

Interpreting the words used by the learned judge in their strictly technical character, that is, taking the words "equitable lien" to mean a lien as of grace and not a lien created by words used in the deed, we find, that the law of Pennsylvania to-day is true to *Kauffelt* v. *Bower*. The court, in *Neas's Appeal*, *supra*, apparently departed from the principle laid down in *Kauffelt* v. *Bower*, but in reality they only decided that the words in the deed showed an intention *to create* a lien upon the land. However, in *Heister* v. *Green*, *supra*, Woodward, C. J., who had dissented in *Neas's Appeal*, said: "The sum of the authorities is that though equitable liens are not favored by our law, yet parties may by *clear and express words* in deeds of conveyance create liens upon land either for purchase money, or for performance of collateral conditions, which will be binding between themselves and their privies, and such liens will be divested by subsequent sheriff's sales unless they are in the nature of testamentary provision for wives and children, or are not capable of valuation, or are expressly created to run with the land. . . . . In *Neas's Appeal* an intention to create a lien was

inferred from the fact that the purchase money stood in the title. But according to all the antecedent cases express words were necessary to establish the lien. It never before was treated as a subject for legal implication, and it is manifestly a hazardous inference to make."

The case of *Heist* v. *Baker* is interesting, because in affirming the decision of the lower court, Woodward, C. J., stated that the case was the very reverse of *Heister* v. *Green*, an authority which the appellant had supposed to be in his favor. See also *Semple* v. *Burd*, 7 S. & R. 286; *Megargal* v. *Saul*, 3 Whart. 19; *Wilhelm* v. *Fulmer*, 6 Pa. 296; *Zentmeyer* v. *Mittower*, 5 Pa. 403; *Stephens' App.* 38 Pa. 9; *Curry* v. *Bott*, 53 Pa. 400. Where the words have been sufficient to create a lien, see *Strauss' App.* 49 Pa. 353; *Eichelberger* v. *Gitt*, 104 Pa. 64.

False Imprisonment—Malicious Prosecution—Conflict of Laws. *The Mexican Central Railway Company, Appellant,* v. *Herbert B. Gehr, Appellee. Appellate Court, First District, Illinois.* Opinion filed July 1, 1896. Action on the case by appellee against appellant. The first and second counts allege a malicious prosecution, the third and fourth, a false imprisonment. The trial resulted in a $4,000 verdict for the plaintiff.

The facts of the case, as well as the legal principals involved, are interesting. The former are briefly as follows: The appellant is a Massachusetts corporation operating a railway in Mexico with offices in the city of Mexico, where the grievances occurred. The appellee, a citizen of Illinois, was employed by appellant as assistant paymaster. On June 17, 1890, a package containing between eight and nine thousand dollars was missed from the paymaster's safe. The loss being discovered, one Jackson, general manager of the appellant's affairs in Mexico, and the assistant treasurer, named Browne, ordered the doors of the room in which the appellee and five others were congregated to be locked, and no one allowed either to depart or enter. Jackson and Browne went to police headquarters, and returned with the Chief of Police and three other officers. After a secret conference between Jackson, Browne and the officials, Browne returned to the locked room, and, pointing to the Chief of Police, said to the appellee: "You will have to go with this man," the appellee obeying. He was taken to the police station where he remained for twenty-four hours until examined by the Second Criminal Court of Mexico, and then was imprisoned for eight weeks in a noisome state prison of that country. On August 14, 1890, he was discharged, the attorney for the state having stated that in his judgment the facts taken into consideration for decreeing his arrest had disappeared. On appellee's return to Chicago the suit was brought in the Circuit Court.

The jurisdiction of the American Court over the offence committed in Mexico is clear. It was proved at the trial that false imprisonment is a redressible offence in Mexico, as well as in the

United States, and consequently the case was cognizable by an American Court: *Webb's Pollock on Torts*, p. 238; *C. & N. W. Ry. Co.* v. *Tuite*, 44 Ill. App. 535.

The court was unanimous as to jurisdiction, but Justice Waterman dissented as to that portion of the appellee's alleged false imprisonment which occurred after the hearing before the Mexican Court. There can be no question but that the detention of the appellee in the room with five others, two of whom were guards in the employ of the appellant, amounted to imprisonment. The doors were not locked so as to prevent egress, but the presence of the guards, together with the order from Jackson, were sufficient evidence for the jury to find, as they did, that it was natural for the appellant to believe that any attempt on his part to leave would have been prevented. To constitute false imprisonment physical detention is not necessary. The law is well stated in *Com.* v. *Knowles*, 17 Kan. 436, as follows: "Nor is it necessary that the act be committed with malice or ill-will. All that is necessary is that the individual be restrained of his liberty, without sufficient legal cause thereof, and *by words or acts which he fears to disregard:*" *Akin* v. *Newall*, 32 Ark. 316; *Ahern* v. *Collins*, 39 Mo. 151; *McNay* v. *Stratton*, 9 Ill. App. 215; *Fuller* v. *Bowke*, 11 Mich. 204; *Gold* v. *Bissell*, 1 Wend. 210; *Brushaker* v. *Stagemann*, 22 Mich. 266; *Moses* v. *Dubois*, Dudley, (S. C.) 209.

The question whether the appellant should have been held liable for the incarceration after the hearing before the Mexican Court presents greater difficulty. It was shown at the trial that according to the laws of Mexico "any person making a charge of a crime against a designated person may become a party to the proceedings and actively assist therein." It was found by the jury that Jackson, the appellant's manager, did so designate the appellee, and that the appellant's attorney was afterwards concerned in the hearing before the Second Mexican Criminal Court. On this ground it was decided by the majority of the court that the appellant was liable for the whole eight weeks' imprisonment. Just what part the appellant's attorney took in the hearing was not ascertained nor was it shown that the Mexican Court was influenced in its decision by any acts or words on the part of the appellant's servants. It seems, therefore, that the majority of the court were wrong in holding the appellant liable for the imprisonment subsequent to the hearing. In the United States damages for false imprisonment cannot be recovered against an informant when the imprisonment complained of took place after hearing before and by order of a judicial tribunal: *Webb's Pollock on Torts*, 265-267; *Lark* v. *Bande*, 4 Mo. App. 186; *Johnson* v. *Morton*, 94 Mich. 1-6. Where one wrongfully causes the arrest of another, and that one is imprisoned by a magistrate or other judicial tribunal, he is liable in a suit for false imprisonment only for the imprisonment prior to the judicial proceedings. The rest is by judicial authority, and the injured

person can only obtain redress through a suit for malicious prosecution: *Lea* v. *Charrington*, 23 Q. B. Div. 45; *Aneman* v. *Jones*, 116 Ind. 41-45. It was not shown that the Mexican Law was different from that just stated, or that the Second Mexican Criminal Court is a ministerial and not a judicial tribunal. On the contrary, it is clear from the evidence that that court's functions are judicial. Justice Waterman's dissenting opinion, therefore, seems to be the better one, and the majority of the court erroneous in holding the appellant liable in a suit for false imprisonment for the incarceration which was ordered by the criminal court, and which took place after the hearing before that tribunal.

While two of the counts in the declaration alleged a malicious prosecution, the elements of that offence, notably malice and lack of reasonable and probable cause, were not present nor was that remedy relied upon by the appellee.

MALICIOUS INTERFERENCE WITH CONTRACT. The cases of *Allen* v. *Jackson*, now waiting judgment in the House of Lords, (reported below as *Flood* v. *Jackson* [1895], 2 Q. B. 21; *Lyons* v. *Wilkins*, 1 Ch. 811 (1896); and *Exchange Tel. Co.* v. *Gregory* [1896], 1 Q. B. 147, suggest a short consideration of the law on this important topic.

Generally speaking, a person has neither rights nor liabilities under a contract to which he is not a party. Though a stranger to the original contract, he may acquire rights under it, as for example, by the laws of agency, by assignment or operation of law, or where there is in fact the relationship of trustee and *cestui que* trust. On the other hand, allowing for the exception of certain classes of contracts in certain jurisdictions, the duty—which Sir William Anson distinguishes from obligation or liability—is imposed upon third parties, extraneous to an obligation, to abstain from malicious efforts to induce one of two parties to a contract to break it, to the damage of the other.

In England, owing to a statute (Statute of Labourers, 23 Edw. 3), it has been held redressible from early times to entice a servant from his master, with knowledge of the relationship of master and servant: See *Lumley* v. *Gye*, 2 E. & B. 216 (1853). In this well-known case the damage complained of consisted in inducing to appear elsewhere one under contract to sing only in the plaintiff's theatre. Two questions were before the court: (1) Would an action lie for procuring such a breach? (2) Is the Statute of Labourers applicable? The majority of the court answered both questions in the affirmative. Coleridge, C. J., dissented; and while the majority are to be followed in their answer to the first question before them, certainly Coleridge's refusal to apply to an opera singer a statute probably designed for manual laborers, deserves respectful attention. And if the doctrine is not dependent on the Statute of Labourers, why should recovery be limited to

cases of personal service? Should it not rather in any event rest on the right to freedom from oppression and malicious mischief?

The American case of *Cronin* v. *Walker*, 107 Mass. 555 (1871), followed *Lumley* v. *Gye*. There shoemakers were induced to quit service, and the court held that the doctrine under consideration "applies to all contracts of employment, if not to contracts of every description:" (page 567).

Subsequently, perceiving that in contractual matters one's comfort and right to freedom from oppression should not be limited to cases of contract for personal service, in a few cases the same rule was extended to other kinds of contracts than those for personal service: *Jones* v. *Stanly*, 76 N. C. 355 (1877); *Angle* v. *Ry.* 151 U. S. 1 (1893).

Of the cases refusing to extend the rule beyond contracts for personal services, *Heywood* v. *Tillson*, 75 Me. 325 (1883), is one of those most frequently cited. In that case the defendant threatened to discharge from his service any one who lived in the plaintiff's house, in consequence of which the then tenant vacated. There was, however, no lease for a fixed term, so that no existing contract was broken, and no damages could be recovered. The question of recovery, because of the particular relationship, was not the principal one before the court. See, however, *Rice* v. *Albee*, 164 Mass. 88 (1895); also, *Anson on Contracts*, Second American Edition, 211 note, and 35 Albany L. J., p. 224, for collection of authorities.

As to the elements essential to recovery:

Where the decision depends on the application of the Statute of Labourers, knowledge of the relationship of master and servant is perhaps all that is necessary to permit recovery: *Bigelow on Torts*, Sixth Edition, p. 108. In other cases the presence of malice is considered essential to the right of action. Malice, where one induces another to break his contract, has been defined to be the use of such persuasion "for the indirect purpose of injuring the plaintiff, or of benefiting the defendant at the expense of the plaintiff." Brett, L. J., in *Bowen* v. *Hall*, 6 Q. B. Div. 338 (1881). This has been said to mean in general that the act was done without just cause or lawful excuse. "Every one has a right to enjoy the fruits and advantages of his own enterprise, skill and credit. He has no right to be protected against competition; but he has a right to be free from malicious and wanton interference, disturbance or annoyance. If disturbance or loss comes . . . from the merely wanton or malicious act of others, without the justification of competition or the service of any interest or lawful purpose, it then is unlawful: *Bigelow on Torts*, Sixth Edition, p. 110, note.

It has also been held necessary to recovery that actual damage be shown. But in the late case of *Exchange Telegraph Co.* v. *Gregory*, cited at the head of this note, a step in advance is taken, the rule being laid down that no special damage need be proved; but

that it is sufficient if the natural consequence of the malicious inducement of the breach, successfully accomplished, be to cause damage to the plaintiff.

The courts have been loth to extend the doctrine to cases of interference with contracts not already formed, but merely in contemplation. In one class of cases, however, a greater willingness is shown to make such an extension, namely in strikes and boycotts: *Temperton* v. *Russell*, L. R. (1893), Q. B. 435.

In line with this come the cases of *Allen* v. *Flood* and *Lyons* v. *Wilkins*, mentioned at the head of this note. In *Allen* v. *Flood*, certain woodworkers and ironworkers were employed to work on a ship. Discovering that the woodworkers had previously done ironwork in the same yards, the ironworkers, through their district delegate, informed the owner of the yards that unless he discharged the woodworkers, they would leave his service. In consequence the woodworkers were discharged. The court held that merely to persuade a person to break his contract gives no cause of action, and that one has a perfect right to advise another not to make a contract; but that if, in either case, the act was done maliciously, the rule would be different. And the court held further that the jury had rightly characterized as malicious, the act of the trade-union delegate, in threatening injury to the employer's business, his motive being to punish the woodworkers for the performance of a lawful act, and to interfere with their liberty of earning their livelihood. In *Lyons* v. *Wilkins*, where the Messrs. Wilkins, leather manufacturers, refused on request to raise the wages of their workmen and alter their system of employment, an attempt was made to get one Schoenthal, a sub-manufacturer, who made goods for Messrs. Lyons, to stop working for them. Failing also in this, a strike of Schoenthal's workmen was ordered. No complaint was made against him, the object of the strike being to injure the Messrs. Lyons. The court held that these facts constituted evidence of malice, and granted an injunction restraining the union from preventing Schoenthal's furnishing goods to Messrs. Lyons, by withdrawing workmen from their employment.

In this country also restraint by injunction is held to be an appropriate remedy in cases of strikes and boycotts: *Sherry* v. *Perkins*, 147 Mass. 212 (1888); *Brace* v. *Evans*, 3 Ry. & Corp. L. J. 561; *Casey* v. *Cin. Typographical Union*, 45 Fed. Rep. 135 (1891); *Coeur d'Alene Mining Co.* v. *Miner's Union*, 51 Fed. Rep. 260 (1892); *Blindell* v. *Hogan*, 54 Fed. Rep. 40 (1893). Conspicuous illustrations of interference by injunction are found in recent railway cases: *Toledo, Ann Arbor & N. M. Ry. Co.* v. *Pa. Ry. Co.*, 54 Fed. Rep. 730 (1893), where an injunction was granted to restrain the Chief Executive of the Brotherhood of Locomotive Engineers from issuing or continuing in force any rule or order of the Brotherhood requiring employees of any of the defendant's railways to refuse to handle the complainant's freight cars in the course of transportation from one state to another,