PROGRESS OF THE LAW.

As Marked by Decisions Selected from the Advance Reports for October.

The claim of a fire insurance company, which has paid insurance to a mortgagee, to a part of the proceeds of a mortgage sale, upon the ground of subrogation to the rights of the mortgagee, is assignable: *Hare* v. *Headley*, (Court of Chancery of New Jersey; Emery, V. C.,) 35 Atl. Rep. 445.

Assignment, Claim to Subrogation

According to a recent decision of Vice-Chancellor Stevens, of the Court of Chancery of New Jersey, when a testator has bequeathed to an incorporated school and its successors a fund in trust, the income thereof to be used for the education of poor children in its district, the abandonment of the school and diversion of the fund will not terminate the trust, so as to entitle the next of kin to the fund; but that still remains subject to a trust for the education of the class of persons designated in the trust instrument, to be administered by equity through the appointment of a trustee: *Green* v. *Blackwell*, 35 Atl. Rep. 375.

Charity, Bequest in Trust, Termination

By the doctrine of *cy près*, as originally established in England, the king's prerogative imposed upon him the duty, as *parens patriae*, to see that the charitable inclinations of his subjects were carried into effect, in any event; and hence the chancellor early assumed the right of applying a charitable bequest which had failed for want of an object, a legal mode of execution, or because it was contrary to law, to some valid charitable purpose, arbitrarily selected by him. But this practice has been restrained in modern times, and it is now the settled rule in England that a charitable gift will be applied *cy près* only when, from its tenor, a general intent appears that it shall go to charity in any event, irrespective of the failure of the particular purpose: *Atty. Gen.* v. *Minshull*, 4 Ves. 11,

1798. This rule, however, never obtained in the United States in even its modified form, since the royal prerogatives were never assumed by the courts of equity, or granted to them; and accordingly the doctrine of *cy près*, properly speaking, never obtained here: *Fontain* v. *Ravenel*, 17 How. 369, 1855; *Grimes* v. *Harmon*, 35 Ind. 198, 1871; *American Academy* v. *Harvard College*, 12 Gray, (Mass.) 582, 1859; *Bascom* v. *Albertson*, 34 N. Y. 584, 1866; *Tilden* v. *Green*, 130 N. Y. 29, 1891. But in order that the charitable intent of the testator should not be wholly defeated where it is possible to uphold it legally, the courts of the United States have adopted a modified form of the English rule. This is enunciated in *Phila.* v. *Girard*, 45 Pa. 9, 1863, as follows:

"A well-defined charity, or one where the means of definition are given, may be enforced in favor of the general intent, even where the mode or means provided for by the donor fail by reason of their inadequacy or unlawfulness. . . . The meaning of the doctrine of *cy près*, as received by us, is, that when a definite function or duty is to be performed, and it cannot be done in exact conformity with the scheme of the person or persons who have provided for it, it must be performed with as close approximation to that scheme as reasonably practicable, and so, of course, it must be enforced. It is the doctrine of approximation, and is not at all confined to the administration of charities, but is equally applicable to all devises and contracts wherein the future is provided for, and it is an essential element of equity jurisprudence."

In some states this limited *cy près* doctrine has been adopted as a part of their general jurisprudence: *Gilman* v. *Hamilton*, 16 Ill. 225, 1854; *Howard* v. *American Peace Soc.*, 49 Me. 288, 1860; *Bliss* v. *American Bible Soc.*, 2 Allen, (Mass.) 334, 1861; *Academy of the Visitation* v. *Clemens*, 50 Mo. 167, 1872; *Burr* v. *Smith*, 7 Vt. 241, 1835; in others, it has been adopted by statute: Acts Pa. 1855, April 26, P. L. 328, § 10; 1876, May 26, P. L. 211; 1889, May 9, P. L. 173; *Derby* v. *Derby*, 4 R. I. 414, 1856; and in others, it has been wholly rejected: *Grimes* v. *Harmon*, 35 Ind. 198, 1871; *Holland* v. *Alcock*, 108 N. Y. 312, 1888; *Tilden* v. *Green*, 130 N. Y. 29,

1891; *Holland* v. *Peck*, 2 Ired. Eq. (N. C.) 255, 1842; *Dickson* v. *Montgomery*, 1 Swan, (Tenn.) 348, 1851.

According to this doctrine, a charitable bequest which is void *ab initio*, by reason of its being illegal, or which never attaches because of the extinction of its object during the testator's lifetime, or fails after his death by reason of the total extinction of those objects, will not be administered *cy près*; but if the mode of execution of the trust only is illegal, or if that only fails, it will be so administered, and a new mode of application appointed: *Gilman* v. *Hamilton*, 16 Ill. 225, 1854; *Jackson* v. *Phillips*, 14 Allen, (Mass.) 539, 1867; *Venable* v. *Coffman*, 2 W. Va. 310, 1867. Thus, a bequest to a school society was ordered, after the abolition of such societies, to be applied to the purchase of books for poor scholars, and defraying their other expenses: *Birchard* v. *Scott*, 39 Conn. 63, 1872; a fund bequeathed to one college to support students was ordered, in the suspension of that college, to be administered *cy près* through another: *Barnard* v. *Adams*, 58 Fed. Rep. 313, 1893; and a fund left to trustees, to establish a female academy in a town, was applied to the support of a public school, the former project proving to be impracticable: *Adams Female Academy* v. *Adams*, 65 N. H. 225, 1889.

So, in *Winslow* v. *Cummings*, 3 Cush. (Mass.) 358, 1849, where a bequest was made to the "Marine Bible Society," and there was no society of that name in existence, but it was shown that at or shortly before the time of the execution of the will there was an association known as "The Boston Young Men's Marine Bible Society," the object of which was "to circulate Bibles among destitute seamen," and that this society had been dissolved, or become extinct, at the time of the testator's death, the court appointed a trustee to receive and dispose of the bequest, by appropriating the avails thereof to the purchase of Bibles, to be distributed among destitute seamen; in *Jackson* v. *Phillips*, 14 Allen (Mass.), 539, 1867, a bequest "for the preparation and circulation of books, newspapers, the delivery of speeches, lectures, and such other means as in their judgment will create a public sentiment that will put an end to negro slavery in this country," and another

"for the benefit of fugitive slaves who may escape from the slave-holding states," were directed, on the *cy près* principle, to be applied as follows: the first to be paid by the trustees, from time to time, to an association already established, to promote the education, support and interests of the freedmen, lately slaves, in those states in which slavery had been so abolished, to be expended for that object; and the second, (being of small amount,) to the use of necessitous persons of negro descent in Boston and vicinity, preference being given to such as had escaped from slavery; and in *Atty. Gen.* v. *Briggs*, 164 Mass. 561, 1895, it was held that where it has been found impracticable to administer the gift in a will of the income of a fund for the support of a school in a certain school district in a town precisely according to the terms of the will, even if the benefits from the fund shall be shared by all the inhabitants of the town, it will not be extending the effect of the gift beyond the proper scope of the doctrine of *cy près* in its application to such a case; and, if it is plainly within the testator's general intent that the town as a whole shall share his bounty, if it cannot otherwise be made available by those residing in the district specified, this court will frame a scheme for applying the income of the fund to educational purposes for the benefit of persons living within the territory which was formerly such district, and in that vicinity, and of such other persons in the town as in the exercise of their legal rights may incidentally derive advantage from it.

Cheating, Evidence

In *Jones* v. *State*, 25 S. E. Rep. 318, the Supreme Court of Georgia lately held, that when the purchaser of goods worth twenty-five cents delivered to the seller a twenty-dollar gold piece, ignorantly supposing that it was a silver dollar, and the latter perceiving the mistake, retained the coin, and returned only seventy-five cents in change, he was guilty of being a common cheat and swindler, under the provisions of § 4595 of the Georgia Code.

In a recent case before Vice-Chancellor Pitney, of the Court of Chancery of New Jersey, the defendant joined with

Corporations, Promoters, Fraud

the owner of a tract of land in procuring options of doubtful value on adjoining tracts, and then organized a corporation, of which he became president, to purchase the land at an advanced price, under an agreement with his co-promoter only that he was to receive part of the profits thus realized. He procured deeds to be made to himself of all the land for an actual consideration of $66,223, recited in the deeds as $80,000, and conveyed it to the corporation for $80,000 and four hundred shares of stock. He distributed the stock *pro rata* among the stockholders, and kept the profits. None of the money paid to the vendors of the land belonged to the defendant or his co-promoter, but all was furnished by the corporation. Upon these facts, it was held that the defendant occupied the position of a promoter of the corporation, and that it was entitled to recover from him the profits so withheld: *Woodbury Heights Land Co.* v. *Loudenslager*, 35 Atl. Rep. 436.

Since the promoters of a corporation occupy a fiduciary relation towards it, they must use the utmost good faith in their dealings with it. They must disclose all the facts material to the transaction, and must state them truly; and if they fail to do this, the corporation, when it learns the true state of affairs, may either rescind the transaction, provided that no equities intervene, or compel the promoters to account to it for the profit they have made. Accordingly, when a promoter undertakes to sell to the corporation property of which he is the owner, or in which he has an interest, it becomes a very material question whether he acted in the transaction as the agent of the corporation, or as a stranger. If he acted in the former capacity, he cannot make and retain any private profit, because to do so would be a fraud on his principal. So, if he buys the property with the object of reselling it to the corporation, he cannot retain any sum received from the corporation in excess of the price he himself paid for it; and it makes no difference in this regard whether the price he receives is more or less than the actual value of the property. The corporation is entitled to all the benefits which may accrue to him from the transaction: *Hichens* v. *Congreve*, 4

Russ. 562, 1828; *Kent* v. *Freehold Land & Brickmaking Co.*, 17 L. T. N. S. 77, 1867; *In re Coal Economising Co.*, 1 Ch. D. 182, 1875; *Erlanger* v. *New Sombrero Phosphate Co.*, 3 App. Cas. 1218, 1878, affirming 5 Ch. D. 73, 1877; *Ex-Mission Land & Water Co.* v. *Flash*, 97 Cal. 610, 1893; *Getty* v. *Devlin*, 54 N. Y. 403, 1873; *Dorris* v. *French*, 4 Hun, (N. Y.) 292, 1875; *McElhenny's Appeal*, 61 Pa. 188, 1869; *Simons* v. *Vulcan Oil & Mining Co.*, 61 Pa. 202. If, however, the promoter deals with the corporation as a stranger, and at arms' length, he is entitled to any profit he can make. As was said by Vice-Chancellor Wigram, in *Foss* v. *Harbottle*, 2 Hare, 461, 1843, "A party may have a clear right to say, 'I begin the transaction at this time; I have purchased land, no matter how or from whom, or at what price; I am willing to sell it at a certain price for a given purpose.'"

Even when the promoter acts as the agent of the corporation, if he is under no special duty to purchase the land in question on behalf of the corporation, he may sell his own land to it, or buy land of another, and resell to it, at any price he chooses to set upon it, if he acts in a perfectly fair and open manner, and the corporation has full knowledge of the facts. But in such a case it is necessary,—first, that the promoter furnish the corporation with a board of directors who will act independent of his influence, and exercise a proper judgment in purchasing the land: *Erlanger* v. *New Sombrero Phosphate Co.*, 3 App. Cas. 1218, 1878, affirming 5 Ch. D. 73, 1877; *In re Hess Mfg. Co.*, 23 Can. Sup. Ct. 644, 1894; *Plaquemines Tropical Fruit Co.* v. *Buck*, 52 N. J. Eq. 219, 1894; *Rice's Appeal*, 79 Pa. 168, 1875; second, he must disclose the fact that he owns or has an interest in the property, and the nature of that interest, in order that the corporation may have full means of judging of the due weight of his arguments in favor of the purchase: *Erlanger* v. *New Sombrero Phosphate Co.*, 3 App. Cas. 1218, 1878, affirming 5 Ch. D. 73, 1877; *Ex-Mission Land & Water Co.* v. *Flash*, 97 Cal. 610, 1893; *Burbank* v. *Dennis*, 101 Cal. 90, 1894; and third, he must state all the material facts, and state them truly. He is not obliged to mention the price he has paid for the property; if he chooses,

he can say, "I will sell it to you for such a price;" but if he undertakes to state the cost price, he must state it correctly. If he misstates it, it is fraud, which will be ground for either rescission, or for compelling him to account for the profit he has made: *Erlanger* v. *New Sombrero Phosphate Co.*, 3 App. Cas. 1218, 1878, affirming 5 Ch. D. 73, 1877; *Ex-Mission Land & Water Co.* v. *Flash*, 97 Cal. 610, 1893; *Burbank* v. *Dennis*, 101 Cal. 90, 1894; *McElhenny's Appeal*, 61 Pa. 188, 1869; *Simons* v. *Vulcan Oil & Mining Co.*, 61 Pa. 202, 1869; *Short* v. *Stevenson*, 63 Pa. 95, 1869; *Densmore Oil Co.* v. *Densmore*, 64 Pa. 43, 1870; *Pittsburgh Min. Co.* v. *Spooner*, 74 Wis. 307, 1889. The mere concealment of a defect in the title to the property will also constitute a fraud which will vitiate the transaction: *Phosphate Sewage Co.* v. *Hartmont*, 5 Ch. D. 394, 1877.

If the promoter is not himself the owner, either in whole or in part, of the property purchased by the corporation, but merely a middleman between the owner and the corporation, the same rules apply. If he acts as the agent of the corporation, he cannot retain any secret profit accruing to himself from the transaction, whether that profit take the form of a lump sum paid by the owner, a percentage of the amount obtained from the corporation over and above an upset price, or a gift of stock in the corporation: *Atwool* v. *Merryweather*, 5 L. R. Eq. 464, 1868; *Lindsay Petroleum Co.* v. *Hurd*, 5 L. R. P. C. 221, 1874; *Bagnall* v. *Carlton*, 6 Ch. D. 371, 1877; *Emma Silver Mining Co.* v. *Grant*, 11 Ch. D. 918, 1878; *Emma Silver Mining Co.* v. *Lewis*, 4 C. P. D. 396, 1879; *In re Fitzroy Bessemer Steel Co.*, 50 L. T. N. S. 144, 1884; (see *Id.* v. *Id.*, 33 W. R. 312, 1885;) *Lydney & Wigpool Iron Ore Co.* v. *Bird*, 33 Ch. D. 85, 1886, reversing 31 Ch. D. 328, 1885; *In re Hess Mfg. Co.*, 23 Can. Sup. Ct. 644, 1894, affirming 21 Ont. App. 66, 1894, which reversed 23 Ont. Rep. 182, 1892; *Chandler* v. *Bacon*, 30 Fed. Rep. 538, 1887; *St. L. & Utah Mining Co.* v. *Jackson*, 5 Cent. L. J. 317, 1887; *Yale Gas Stove Co.* v. *Wilcox*, 64 Conn. 101, 1894; *Brewster* v. *Hatch*, 122 N. Y. 349, 1890.

It does not necessarily follow that a promoter who is com-

pelled to account must pay over the whole of the profit he has received. If he has expended funds of his own in legitimate expenses incurred in forming and organizing the corporation, or if he is entitled to renumeration for his services, he is entitled to credit therefor: *Emma Silver Mining Co.* v. *Grant*, 11 Ch. D. 918, 1878; *Burbank* v. *Dennis*, 101 Cal. 90, 1894; but he is not entitled to credit for illegal expenses incurred and paid, such as payments to another to obtain a personal guarantee for the taking of stock: *Lydney & Wigpool Iron Ore Co.* v. *Bird*, 33 Ch. D. 85, 1886, reversing 31 Ch. D. 328, 1885.

A promoter will not be held liable to refund secret profits, if the corporation has delayed seeking to recover them for too long a time, so that the equities of third persons have intervened, or rescission has become impossible: *Ladywell Mining Co.* v. *Brookes*, 35 Ch. D. 400, 1887, affirming 34 Ch. D. 398, 1886; or if the purchase was made with the knowledge and assent of all the members of the corporation: *In re Ambrose Lake Tin & Copper Mining Co.*, 14 Ch. D. 390, 1880. But if the corporation refuses to sue on demand by the stockholders, the latter may recover from the promoter: *Burbank* v. *Dennis*, 101 Cal. 90, 1894.

Stock Dividends, Rights of Life Tenant

Stock dividends, declared from net earnings made after the death of a testator who bequeathed for life the stock on which the dividends were declared, belong to the life-tenant as income, not to the remaindermen as part of the *corpus* of the estate: *Pritchett* v. *Nashville Trust Co.*, (Supreme Court of Tennessee,) 36 S. W. Rep. 1064.

Criminal Law, Right to Open and Close, Appeal, Review

In a recent case before the Supreme Court of Georgia, the accused introduced no evidence on the trial in the court below, and thus obtained the right to open and conclude the argument to the jury. At the conclusion of the evidence one of his counsel addressed the jury, after which the counsel for the state, without any previous warning of such an intention, announced that he did not desire to argue the case. One of the counsel for the

accused, who had not addressed the jury, then approached the judge, and stated privately that he desired to argue the case, and wished the court to know that he insisted upon it, as a legal right of the accused, but the judge informed him, also privately, that no further speech would be allowed for the accused, that the rule was that in no case should more than one counsel be heard in conclusion, and that under the circumstances the accused had had both the opening and the conclusion. This was assigned as error, but the Supreme Court held that if the counsel desired to invoke a ruling of the court on the question, he should have made in open court a request or motion for permission to argue the case, and obtain a decision thereon, instead of approaching it privately; and that the private conversation between him and the judge was not proper subject-matter for review: *Grant* v. *State*, 25 S. E. Rep. 399.

Electric Wires, Negligence

The question as to the liability of a company which maintains and uses a wire charged with a powerful electric current has of late frequently engaged the attention of the courts. One of the most recent cases dealing therewith is that of *Atlanta Consolidated St. Ry. Co.* v. *Owings*, 25 S. E. Rep. 377, in which the Supreme Court of Georgia held: (1) That when, in the prosecution of its business, a corporation employs a wire which, because of its being charged with a powerful and dangerous current of electricity, is liable, upon coming in contact with the wires of other corporations, to cause injury or death to the employes of the latter while engaged in the performance of their duties, the former corporation owes the employes of the latter the duty of observing at least ordinary diligence, not only in preventing such contact, but also in discovering it and preventing its continuance, though occasioned by the negligence of others; and even when the negligence is that of the corporation whose employes are thus exposed to danger; and

(2) That if a person, while upon a pole a considerable distance above the ground, is so shocked, burned and put in pain by a current of electricity that he loses his strength or

consciousness, and the control of his movements, and in consequence falls to the ground and dies, it is safe to assert that his death was caused by the electric current, whether or not death would have ensued if the deceased had not fallen from the pole.

Equitable Conversion

The Supreme Court of Alabama has recently decided, that when a testatrix, during her lifetime, directed her agent to invest the proceeds of certain real estate in Alabama state bonds, and those proceeds came to his hands before her death, but he failed to so invest them until after that event, while executor, the bonds so purchased would not pass under a bequest of "whatever Alabama state bonds I may have remaining at the time of my death, now amounting to seven in number, of one thousand dollars each," on the ground that the direction of the testatrix to the agent created an equitable conversion of the fund into said bonds, though she owned no other bonds of that state: *Bromberg* v. *Bates*, 20 So. Rep. 786.

Fidelity Insurance, Construction of Policy, Change of Employment, Knowledge of Co-employe

The questions arising under the contract of fidelity insurance are now of sufficient frequency and importance to make this a distinct branch of the law of insurance. Contrary to what might have been expected, however, the decisions on these questions by the different courts of the United States have been reasonably consonant. The latest cases on this subject come from the Supreme Court of Georgia, which holds

(1) That under a contract by which a fidelity and casualty company binds itself to make good to a bank, to a specified extent, such pecuniary loss as the latter may sustain by reason of the fraud or dishonesty of a designated employe in connection with his duties as receiving teller, "or the duties to which, in the employer's service, he may be subsequently appointed or assigned by the employer," the bank has the

right to confer upon him the office of assistant cashier, in addition to that of receiving teller, without notifying the company; and after this is done, the company is as much bound to make good to the bank losses occasioned during the period covered by the contract by reason of the dishonesty or fraud of the employe while acting in the capacity of assistant cashier, as those occurring while he acts in that of receiving teller;

(2) That although the contract of insurance requires the bank to give notice to the company of any act of fraud or dishonesty on the part of the employe in question, immediately upon the discovery thereof, and also to notify the company immediately after knowledge by the bank of the commission of any act on his part involving a loss to the company of more than one hundred dollars, yet when the contract contains no stipulation making it in any degree incumbent on the bank to exercise any diligence or care in inquiring into or supervising the conduct of that employe, or of any of his fellow employes in its service, and imposes upon it no duty to vouch for the fidelity or efficiency of the latter, or to require them to watch and report upon his actions, information or knowledge on the part of the cashier of the bank, (who is only a fellow employe,) as to the matters concerning which the insurer company had stipulated for notice, would not, so far as it is concerned, be imputable, under these circumstances, to the bank itself: *Fidelity & Casualty Co.* v. *Gate City Natl. Bk.*, 25 S. E. Rep. 392.

See *Supreme Council Catholic Knights of America* v. *Fidelity & Casualty Co. of N. Y.*, 63 Fed. Rep. 48, 1894; *Mechanics' Sav. Bk. & Trust Co.* v. *Guarantee Co. of North America*, 68 Fed. Rep. 459, 1895.

Default of Employe

By another decision of the same court, a fidelity insurance company which covenanted with a receiver engaged in operating a railroad that during the continuance of its bond certain specified employes of the receiver should " faithfully and honestly discharge their duties in their several capacities, and shall also faithfully and truly account for all moneys and property and other things which may come into their possession in their respective employments,

whenever thereto required by the employer, or a duly-authorized officer in that behalf, and, at the termination of their said employments, shall surrender and deliver up to the employer, or a duly-authorized representative, all moneys, books, vouchers, papers, tickets, and all other property belonging to the employer, or for which the employer shall be liable to another, or other party or parties, which shall then be, or which ought to be, in the hands, possession, or custody of the employes, or either of them; and the company hereby indemnifies the employer against all loss which the employer shall sustain by reason of the default of any or either of the employes in the premises, not exceeding in the whole the sum or sums as hereinafter provided," was held not liable to the insured in damages for a loss resulting from a wrongful delivery of freight by one of these employes, in consequence of which the receiver was compelled to pay the value of the freight to its true owner, since the wrongful delivery occurred before the bond was executed; and that the fact that the employe, though liable to do so, failed and refused, at the termination of his employment, to pay the receiver the damages the latter sustained by reason of the wrongful delivery, did not impose any liability upon the insurer: *Dorsey* v. *Fidelity & Casualty Co. of N. Y.*, 25 S. E. Rep. 521.

Fire Insurance, Subrogation Clause, Change of Title

When a fire insurance policy contains a subrogation clause, providing that the loss, if any, shall be payable to a mortgagee, or his assigns, as his or their interest may appear, the owner of the mortgage is the insured, to the extent of his interest, and a change of title which increases his interest in the insured property, even to absolute ownership, is not such a change of ownership as requires notice to be given to the insurer, under a stipulation in the policy that the mortgagee shall notify the insurer of any change of ownership; and therefore a failure to give notice will not release the insurer from liability: *Dodge* v. *Hamburg-Bremen Fire Ins. Co.*, (Court of Appeals of Kansas, Southern Department, D. C.,) 46 Pac. Rep. 25.

Another new phase of insurance is that of insurance against liability for damages, or, to give it a distinct name, liability

Insurance Against Liability for Damages, Construction of Policy

insurance. This differs somewhat from other modes of insurance, since, as was recently held by the Supreme Court of Arkansas, a policy promising to pay all damages with which the assured may be legally charged, or required to pay, or for which it may be legally liable, is not a contract of indemnity alone, but also a contract to pay liabilities; and a discharge of such liabilities by the assured is not a necessary condition precedent to a recovery thereon, the measure of recovery being the amount of the accrued liability: *American Employers' Liability Ins. Co.* v. *Fordyce*, 36 S. W. Rep. 1051.

No action can be maintained on the policy, however, until the liability is liquidated.

Public Officer, Office de facto, Payment of Salary, Rights of Officer de jure

A municipal corporation, which has paid a salary to a *de facto* officer, who performed the duties of the office, under color of title, while the right to it was in litigation, cannot be held liable therefor again to another who may thereafter establish his title to the office: *Fuller* v. *Roberts County*, (Supreme Court of South Dakota,) 68 N. W. Rep. 308.

Public Records, Inspection, Abstractor of Titles

The Supreme Court of Michigan has lately held, that when it does not appear that a suit pending in the circuit court involves, or is in any way connected with, the land that an abstractor was employed to abstract the title of, by way of contract, or otherwise, or that it is necessary to the interests of his employer that he be allowed to inspect the file of the suit, mandamus will not lie to compel the county clerk to allow him to inspect and copy the file before trial: *Burton* v. *Reynolds*, 68 N. W. Rep. 217.

There was no general right of inspection and examination of public records at common law, unless the person who sought it had some interest in the matters contained in them, either as a citizen or as a private individual; and in the latter instance, only when that interest was involved in a pending suit. If no such interest existed, the custodian of the records might grant or refuse an inspection at his discretion, and the court would not control him in its exercise: *King* v. *Justices*,

6 Ad. & El. 84, 1837; *In re McLean*, 9 Cent. L. J. 425, 1879. This rule, however, was soon relaxed, and the distinction between public and private interests became obsolete: *Herbert* v. *Ashburner*, 1 Wils. 297, 1750; *People* v. *Cornell*, 47 Barb. (N. Y.) 329, 1867; and the constant multiplication of public records, with the fact that their existence is notice to all the world of the matters contained in them, renders it imperative that any one who has an interest in such records should be allowed to inspect them at will, and to enforce his right against the refusal of the custodian: *Harrison* v. *Williams*, 4 D. & R. 820, 1824; *Brewer* v. *Watson*, 61 Ala. 310, 1878; *Id.* v. *Id.*, 65 Ala. 88, 1880; *Id.* v. *Id.*, 71 Ala. 299, 1882; *Silver* v. *Whitmore*, 45 Ill. 224, 1867; *Hawes* v. *White*, 66 Me. 305, 1876; *Aitcheson* v. *Huebner*, 90 Mich. 643, 1892. This right, however, does not extend to records which are only *quasi*-public, such as the court-rolls of an English manor: *Hereford* v. *Bridgewater*, Bunb. 269, 1729; the records of a church or cemetery, or a marriage license docket: *In re Marriage License Docket*, (Pa.) 4 D. R. 284, 1895; *contra*, *Id.*, 4 D. R. 162, 1895; or the records of a justice of the peace: *Perkins* v. *Cummings*, 66 Vt. 485, 1894; and certainly does not exist when the only purpose for which the inspection is sought is that of gratifying private curiosity or malice, of making public scandalous matters, or of acquiring gain through disclosure of private affairs to the world: see *Park* v. *Press Co.*, 72 Mich. 560, 569, 1888; *Schmedding* v. *May*, 85 Mich. 1, 1891.

In most of the United States this right of inspection of public records is granted by statute; and where this is the case, any one has a right to inspect them at pleasure, irrespective of any interest he may have therein, unless, perhaps, when the disclosure sought would be detrimental to the public interests, or contrary to sound policy, or is sought on behalf of a citizen of another state: *Brewer* v. *Watson*, 61 Ala. 310, 1878; *Diamond Match Co.* v. *Powers*, 51 Mich. 145, 1883; *In re Marriage License Docket*, (Pa.) 4 D. R. 284, 1895; *contra*, *Id.*, 4 D. R. 162, 1895; and if the clerk refuses to permit it, he may be compelled to do so, and cannot demand

fees therefor: *In re Chambers*, 44 Fed. Rep. 786, 1891; *Lum* v. *McCarty*, 39 N. J. L. 287, 1877; *State* v. *Long*, 37 W. Va. 266, 1892. An inspection will be enforced, even though by the rules of the office the records are to be kept secret: *Ex p. Drawbaugh*, 2 D. C. App. 404, 1894. But the records of private suits stand on a different footing; they are not strictly public until the trial is over, and public policy frequently forbids their disclosure. Accordingly, a newspaper or private individual cannot enforce an inspection of them for the purpose of gratifying private animosity, or of making personal profit out of the disclosure of the private matters contained in them: *Park* v. *Press Co.*, 72 Mich. 560, 569, 1888; *Schmedding* v. *May*, 85 Mich. 1, 1891.

It is by no means finally settled whether the right of inspection extends to the case of an abstractor or insurer of titles, who, by making searches for compensation, interferes with the emoluments of the custodian of the records, and who also, in populous and wealthy districts, by occupying the office of the custodian with a force of men for the purpose of abstracting all the records, may interfere with the business of the office and the rights of others. On various grounds, the unsubstantial one of apprehended injury to the records, as well as the more reasonable ones stated above, this right has been held not to exist in Alabama: *Phelan* v. *State*, 76 Ala. 49, 1884; *Randolph* v. *State*, 82 Ala. 527, 1886; in Colorado: *Bean* v. *People*, 7 Colo. 200, 1883; in Georgia: *Buck* v. *Collins*, 51 Ga. 391, 1874; in Maryland: *Belt* v. *Prince George's Co. Abstract Co.*, 73 Md. 289, 1890; in Michigan: *Webber* v. *Townley*, 43 Mich. 534, 1880; and in New Jersey: *Fleming* v. *Clerk*, 30 N. J. L. 280, 1863. But the Michigan case was soon overruled: *Burton* v. *Tuite*, 78 Mich. 363, 1889; and the legislature of Colorado passed an act on the heels of the decision there, declaring the right in terms beyond a peradventure: *Stocknan* v. *Brooks*, 17 Colo. 248, 1892. In New Jersey, however, the Court of Errors and Appeals, after overruling *Fleming* v. *Clerk*, 30 N. J. L. 280, 1863, in *Lum* v. *McCarty*, 39 N. J. L. 287, 1877, has recently overruled the latter and returned to its first love: *Barber* v. *West Jersey Title & Guaranty Co.*, 53 N. J.

Eq. 158, 1895, reversing 49 N. J. Eq. 474, 1892. In spite of this conflict of opinion, however, the weight of authority, as well as of reason, supports the view that an abstractor has a right to inspect the records for any reason he chooses to give, or without any, and to copy them, if he sees fit, as long as in so doing he does not interfere with the business of the office or the rights of others, and cannot be required to pay the custodian of the records for that privilege: *In re Chambers*, 44 Fed. Rep. 786, 1891; *Stocknan* v. *Brooks*, 17 Colo. 248, 1892; *Upton* v. *Catlin*, 17 Colo. 546, 1892; *Burton* v. *Tuite*, 78 Mich. 363, 1889; *Id.* v. *Id.*, 80 Mich. 218, 1890; *Day* v. *Button*, 96 Mich. 600, 1893; *Burton* v. *Reynolds*, 102 Mich. 55, 1894; *People* v. *Richards*, 99 N. Y. 620, 1885: *People* v. *Reilly*, 38 Hun, (N. Y.) 429, 1886; *Comm.* v. *O'Donnel*, (Pa.) 12 W. N. C. 291, 1882; *Hanson* v. *Eichstaedt*, 69 Wis. 538, 1887. But the custodian has the right to make reasonable rules and regulations for the use of his office, and to these the abstractor must conform: *Upton* v. *Catlin*, 17 Colo. 546, 1892; *Day* v. *Button*, 96 Mich. 600, 1893; *People* v. *Richards*, 99 N. Y. 620, 1885; and the payment of a fee for providing additional office facilities is a reasonable regulation: *Burton* v. *Reynolds*, 102 Mich. 55, 1894.

Some courts have attempted to draw a distinction between the right of inspection and the right of copying the records; affirming the former and denying the latter, unless the abstractor was employed for that special purpose: *Randolph* v *State*, 82 Ala. 527, 1886; *Cormack* v. *Wolcott*, 37 Kans. 391, 1887; *Boylan* v. *Warren*, 39 Kans. 301, 1888; but this is fallacious, and is generally obviated by an express provision granting the right of making copies: *State* v. *Rachac*, 37 Minn. 372, 1887; *Hanson* v. *Eichstaedt*, 69 Wis. 538, 1887.

Irrespective of other considerations, one would think that when a corporation was chartered for the express purpose of making abstracts and insuring titles these rights accrued to it: *People* v. *Reilly*, 38 Hun, (N. Y.) 429, 1886; but the Court of Appeals of Maryland is of a different opinion: *Belt* v. *Prince George's Co. Abstract Co.*, 73 Md. 289, 1890.

The proper method of enforcing this right, when denied by

the custodian, is by mandamus, as was asserted or admitted in almost all the cases cited above, especially in *Barber* v. *West Jersey Title & Guaranty Co.*, 53 N. J. Eq. 158, 1895, reversing 49 N. J. Eq. 474, 1892; see, also, *Brewer* v. *Watson*, 61 Ala. 310, 1878; *Id.* v. *Id.*, 65 Ala. 88, 1880; *Id.* v. *Id.*, 71 Ala. 299, 1882; *Hawes* v. *White*, 66 Me. 305, 1876; *Aitcheson* v. *Huebner*, 90 Mich. 643, 1892; *People* v. *Cornell*, 47 Barb. (N. Y.) 329, 1867; *State* v. *Long*, 37 W. Va. 266, 1892. In the few cases in which the remedy by injunction has been tried, the right has either been denied, or the selection of the remedy held erroneous: *Buck* v. *Collins*, 51 Ga. 391, 1874; *Scribner* v. *Chase*, 27 Ill. App. 36, 1888; *Diamond Match Co.* v. *Powers*, 51 Mich. 145, 1883; *Belt* v. *Prince George's Co. Abstract Co.*, 73 Md. 289, 1890; *Barber* v. *West Jersey Title & Guaranty Co.*, 53 N. J. Eq. 158, 1895, reversing 49 N. J. Eq. 474, 1892; in spite of the many considerations which would seem to make that remedy preferable: see 31 AM. L. REG. N. S. 769.

Railroads, Employe Riding on Free Ticket, Contract for Exemption from Liability

According to a recent decision of the Supreme Judicial Court of Massachusetts, a ticket given to an employe of a railroad who lives at a distance from the terminus of the road is not free, if it is given in consideration of his services as an employe; and an employe riding on such a ticket is not a free passenger, and accordingly, the company cannot, by contract, exempt itself from liability to him for its negligence: *Doyle* v. *Fitchburg R. R. Co.*, 44 N. E. Rep. 611.

Resulting Trust, Husband and Wife, Evidence

If a wife turns over to her husband money received from her father's estate, without any agreement for its investment, the fact that the husband subsequently informs the wife that he has invested it in certain land for her, when, in fact, he has not done so, but has taken title thereto in his own name, is not sufficient to create a resulting trust therein in favor of the wife: *Nashville Trust Co.* v. *Lannom*, (Court of Chancery Appeals of Tennessee,) 36 S. W. Rep. 977.

Subrogation, Lender of Money used to satisfy Lien

In a late case in the Supreme Judicial Court of Massachusetts, *Falmouth Natl. Bk.* v. *Cape Cod Ship-Canal Co.*, 44 N. E. Rep. 617, a corporation, chartered for the purpose of constructing a canal, and required by its charter to make a deposit with the treasurer of the commonwealth to secure the payment of damages for land taken, and for labor in construction, entered into a contract with an individual for the entire construction, by which the contractor received all the stock and bonds of the corporation, and bound himself to pay all claims against the company growing out of the construction. The contractor issued debenture bonds, secured, with the consent of the corporation, by a pledge, as collateral, of his contract for stock and bonds, and by scrip certificates of the corporation, exchangeable for mortgage bonds on completion of the work. The proceeds of these debentures were used in payment for land and other claims which would have been a lien on the fund deposited with the treasurer. But in spite of this, and of the fact that the corporation had practically assumed the payment of the debentures, the holders of the latter were held not to be entitled to a lien by subrogation on the fund in the hands of the treasurer.

Turnpikes, Shunpikes, Injunction

A county road, which would be of great convenience to people living between two existing roads, one of which is a turnpike, by shortening their line of travel to the town in which the roads terminated, and which would be of great utility in time of high water, is not a shunpike, such as will entitle the turnpike company to enjoin its location, though the effect of its construction would be to decrease the business of the company: *Clarksville & R. Turnpike Co.* v. *City of Clarksville*, (Court of Chancery Appeals of Tennessee,) 36 S. W. Rep. 979.

Ardemus Stewart.