THE
AMERICAN LAW REGISTER

FOUNDED 1852.

UNIVERSITY OF PENNSYLVANIA

DEPARTMENT OF LAW

SUBSCRIPTION PRICE, $3.00 PER ANNUM. SINGLE COPIES, 35 CENTS.

Published Monthly for the Department of Law by MEREDITH HANNA and DANIEL S. DOREY, at 115 South Sixth Street, Philadelphia, Pa. Address all literary communications to the EDITOR-IN-CHIEF: all business communications to the TREASURER.

ALIENATION BY THE COURTS. A case of considerable interest and of far-reaching importance has been recently decided by the Supreme Court of Pennsylvania. I refer to *Freeman's Appeal*, 181 Pa. 405 (Mar. 27, 1897). It was an appeal from the Orphans' Court of Philadelphia County, resulting in an affirmance of the decree, the Chief Justice and Mr. Justice Williams dissenting. The case was this: Henry G. Freeman, by his last will, devised to the Girard Trust and Life Insurance, Etc., Company certain real estate at the southeast corner of Broad and Chestnut streets, Philadelphia, in trust, to make sales of all or any part of his real estate, at its discretion, for the benefit of his estate, either at public or private sale, etc.; provided always, nevertheless, that no such sale of any part of his real estate shall be made without the consent in writing

of the several *cestuis que trustent* having any interest therein, and who may, at the time being, be of lawful age and accessible, and with further power to make loans, from time to time, of the real estate, and to collect, demand and receive the rents, incomes and proceeds thereof, etc.

On petition of one of the *cestuis que trustent* the Orphans' Court granted leave to the trustee to execute an "improvement lease," for fifty years, of the property, against the express objection of *cestuis que trustent* owning a one-sixth interest therein.

Then *cestuis que trustent* appealed. The contention of the appellees was, that the Orphans' Court had jurisdiction to make the decree under Section 2 of the Act of April 18, 1853, familiarly known as the "Price Act." The words of that section are: "Such sale, mortgaging, leasing or conveyance upon ground rent may be decreed whenever such real estate may be held for or owned by . . . trustees for any public or private use or trust, and although there may exist a power of sale, but the time may not have arrived for its exercise, or any preliminary act may not have been done to bring it into exercise, or the time limited for its exercise may have expired, or any *one or more persons required to consent or to join in its execution* may have become *non compos mentis*, or have removed out of the State, or died, or should refuse to act, *or unreasonably withhold consent*," etc. In the first section of the act it is provided that such sale, etc., may be decreed only when the court is of opinion that it will be for the interest of the parties concerned, "and may be done without injury or prejudice to any trust, charity or purpose for which the same shall be held."

The act, therefore, would seem to give the court power to grant just such a decree as was asked for in this case. For the fact that the decree would dispense with the actual consent required by the terms of the will creating the trust, cannot be considered *ipso facto* an "injury or prejudice" to the trust within the meaning of the first section of the act—for *ex necessitate* every such decree would have this effect. The court below, in Freeman's Appeal, having been convinced that the withholding of consent was unreasonable, were right in making the decree, therefore, useless: *first*, the "improvement lease" not being really a sale, was not within the power of the trustees under any circumstances; and, *second*, the authority given the court was beyond the constitutional power of the legislature. It seems to me that an "improvement lease" is very far from being equivalent to, or even analogous to, or part of, a sale. And as it was not pretended that the power to "lease" in the will included such a "lease" as this, there was no right on the part of the court to decree a disposition of the property in any way not contemplated by the testator. It can hardly be supposed that it was the purpose of the act to enlarge the powers of testamentary trustees beyond that given them in the will—it is rather to enable the express purposes of the trust to be carried out in

cases where some unforeseen circumstances or neglect of duty by the trustees, etc., would otherwise prevent their accomplishment. To say that the power to sell authorizes the trustees to lease property for fifty years, on condition that the lessee will erect a building on the ground in place of those already there, is certainly quite a liberal construction of the words "to sell." And if a trustee's powers are limited by the terms of the trust, such a construction is quite impossible. Bring this out into bold relief: The will says the trustee shall have full power to *sell* with the written consent of all *cestuis que trustent.* The decree says the trustee shall execute an improvement lease against the express objections of the said *cestuis que trustent.*

This is so plainly subversive of the trust, that it ought not, it is submitted, to be attempted by any court. But suppose an ordinary sale had been the subject of the petition, and the *cestuis que trustent* had, as in the actual case, refused their consent, let us ask, in the first place, does the act intend to confer power on the court to act in such a case if it shall consider the refusal unreasonable? and, if so, is the grant of power constitutional? As to the first question, a careful reading of the act will convince one that the legislature *did* intend to do just that thing. And so the final and important question is, is such a grant of power to the courts valid? Mr. Chief Justice Sterrett has pointed out in his dissenting opinion (p. 414) the line beyond which, I believe, the legislature cannot go. He says as to the power of the courts to "coerce" people to consent: "*If they owe a duty*, this may be conceded." But as to the disposal of their legal or equitable estates, persons *sui juris* have a right to exercise their good pleasure in disposing of them, without being accountable to anyone for the reasons which actuate them. *Voluntas stat pro ratione*, as the Chief Justice reminds us. The legislature could not grant to the courts power to compel A to assent to the sale of property of which he is tenant in common with B, no matter how clearly such sale would appear to be for the advantage of both; and it is inconceivable that a different rule can apply to an equitable estate when A.'s consent is expressly made a condition precedent to any disposition of the property. *Ervine's Appeal*, 16 Pa. 256, and the other cases cited by the learned Chief Justice at p. 413, abundantly sustain this position. Of course, in many cases—doubtless in the present case—the doctrine I contend for may produce great inconvenience, loss and injury. Persons *sui juris*, and, legally speaking, of sound mind, will sometimes obstinately adhere to a position, in defiance of all common sense and reason, to the great annoyance and disadvantage of others, whose rights are bound up with theirs. But the evils of the contrary doctrine are even greater. The substitution of the judgment of a court for that of an individual is a dangerous inroad upon individual liberty and control of property. Such a power might easily be abused and a species of "paternalism" introduced, which it is not agreeable to contemplate even at a distance. *Lucius S. Landreth.*

EXECUTOR'S ELECTION UNDER A WILL. Does the simple qualification of a son as executor under his father's will amount to an election on the part of the son to take under the will?

This important question was raised in North Carolina for the first time in the case of *Allen* v. *Allen*, 28 S. E. 513 (Sup. Ct. N. Car., Dec. 24, 1897). There a father, dying in 1874, devised to his son a certain lot of ground, and made the son his executor. Two years before his death, however, the father had given his son a deed in fee simple for the same lot of ground. The son qualified as executor, and the first question was whether by that act he had elected to take the property under the will instead of under the deed.

At Common Law there was no doubt. By the act of qualification, the executor became vested with the whole personal estate, and, after the payment of debts and legacies, was entitled to the surplus, unless it appeared on the face of the will that the testator did not so intend. It is manifest, then, that the executor, after qualification, was bound to execute the provisions of the will; but the reason for the Common Law rule is of no force at the present day, because executors, after the debts and legacies are paid, are trustees of the residuum for the next of kin. Yet the same conclusion is arrived at by adopting the view expressed in *Mendenhall* v. *Mendenhall*, 8 Jones (N. C.), 287 (1860), that a widow who qualified as executrix of her deceased husband, and took upon herself the execution of the will, waived her right to dissent. The Chief Justice (Pearson) said: "Upon qualifying, she assumes the duties and undertakes on oath to carry into effect the several provisions of the will, and it is inconsistent afterwards to do an act which defeats, or in a great degree deranges, the provisions of the will, and disappoints the intention of the testator therein expressed."

This seems to be a very reasonable rule, and there are no cases to the contrary as far as we have been able to discover. So it was held by analogy that the son held the land under the will.

Two further questions arose. The son had mortgaged the land, and it was held, without doubt, that the mortgagee had a first lien without reference to the manner in which his mortgagor had acquired title. The father had stipulated that if his son took the land he should pay the estate $2000. This was resolved to be a charge, and not a condition precedent, so that the son had a vested estate.

LIQUIDATED DAMAGES. In the case of *Allison* v. *Dunwody*, 28 S. E. 651 (Dec. 17, 1896), published Jan. 17, 1898, the Supreme Court of Georgia decided a rather interesting case, involving the question of liquidated damages. The plaintiff in the case was not, as is usual, seeking to be relieved from the damages as a penalty, but was, in fact, seeking to recover additional damages over and above those agreed upon in the contract as liquidated damages. The defendant in the case bought some real estate from assignor of

the plaintiff for $1440 under an agreement by which he was to pay $480 cash and balance in one year, upon default, vendor to have right to re-enter and take possession of the property, and sums paid by defendant to be retained by the vendor as liquidated damages. Defendant having paid $250 additional, became in default, and suit was brought to recover $786.80 being balance of principal and interest due. Defendant demurred on ground that plaintiff had failed to allege that defendant was in possession of property and, also, that contract permitted no right of recovery for any amount against defendant, for it provided for right of re-entry in case of failure of defendant to pay the balance due.

These demurrers were sustained and upon appeal were affirmed by the Supreme Court. The court held that since the parties had made a definite contract covering the points involved and as they were equally competent to provide for the amount of damages to be paid in case of failure to perform, as to determine any other matter contained in the contract, and since the damages seemed reasonable and fair, the parties must abide by their own agreement. Under the facts in this case the decision would seem to be a fair one, since the defendant, who was the party who might have asked relief, seemed to be satisfied to abide by the contract. But, had the parties been reversed, the reasoning of the court would not necessarily be conclusive.

It has been generally held in such cases, that when the retention of amounts paid under such a contract are in excess of the real damage sustained and the latter is readily ascertainable, such retention will be considered a penalty or forfeiture irrespective of the mere language used in the contract.

In this case the real damages sustained might have been certain and ascertainable. in which case, had the defendant proved that they were for less than the sum paid by him on account of the purchase, he might have well asked for relief, in spite of the fact that he had definitely contracted that plaintiff was to retain such sums, and was competent to so contract. If it could have been shown that plaintiff, as a matter of fact, had resold the premises to another purchaser at an increased price, he could not have well claimed more than nominal damages, and retention of defendant's purchase money in such a case would have been clearly a penalty. But in this case the decision was clearly just, since the plaintiff had received all the damages that the contract gave him a right to exact and his claim to further damages was seemingly without warrant: *Kemble* v. *Farren*, 6 Bing. 141; *Re Newman*, L. R. 4 Ch. Div. 724; *Shreve* v. *Breweton*, 51 Pa. 175; *Spear* v. *Smith*, 1 Denio, 464; *Wallis* v. *Carpenter*, 13 Allen, 19; *Lymon* v. *Babcock*, 40 Wis. 503; *Coster* v. *Strom*, 41 Minn. 522; *Taylor* v. *Sandiford*, 7 Wheat. 13.

RES IPSA LOQUITUR. In certain classes of cases, where there is no direct evidence of any particular act of negligence beyond the

mere fact that something unusual has happened which has caused the injury, the courts have said that the doctrine of *res ipsa loquitur* may be properly applied. The literal translation of this phrase defines, to the full extent, the meaning of the principle, viz., "the thing speaks for itself." The maxim, or phrase, is merely a short way of saying that, so far as the court can see, the jury, from their experience as men of the world, may be warranted in thinking that an accident of this particular kind commonly does not happen except in consequence of negligence; and that, therefore, there is a presumption of fact, in the absence of further explanation or other evidence, that the injury happened in consequence of negligence. In other words, the circumstances attendant upon the accident are themselves of such a character as to justify a jury in inferring negligence.

Thomas, in his recent book on Negligence, p. 574, states the rule as follows:

"The principle is basic that the mere happening of an accident through the existence of a defect does not, *per se*, impute negligence, that is, raise a presumption of negligence, but evidence must be given tending to show that the defect existed by reason of some culpable act or omission of the person charged.

"This rule is of very general application, and the exceptions to it are limited and may be classified under two heads:—

1. When the relation of carrier and passenger exists and the accident arises from some abnormal condition in the department of actual transportation.

2. Where the injury arises from some condition or event that is in its very nature so obviously destructive of the safety of person or property, and is so tortious in its quality as, in the first instance, at least, to permit no inference save that of negligence on the part of the person in the control of the injurious agency."

The doctrine is one which is firmly settled; the question is concerning its application. It has been well said that no presumption of negligence ever arises from the mere unexplained happening of an accident, but only from the attendant circumstances. The real question, then, is as regards the attendant circumstances, and each case must stand wholly on its own facts. Very little can be generalized, but it may, perhaps, be safely stated that where a certain course of action has been pursued by any person without injury to others, and he, upon changing that course, injures another, the thing (unexplained) speaks for itself that such person has been negligent.

Chief Baron Pollock said in *Byrne* v. *Boadle*, 2 Hurlstone and Coltman's Exch. 722 (1863), at p. 728: "A barrel could not roll out of a warehouse without some negligence, and to say that a plaintiff who is injured by it must call witnesses from the warehouse to prove negligence seems to me preposterous." In *Excelsior Electric Co.* v. *Sweet*, 57 N. J. Law, 224 (1894), it was held that the fall of an arc lamp suspended over a public street, without any

explanatory evidence, raises a presumption of negligence, *res ipsa loquitur*, sufficient to put the defendant on the defense. In *Consolidated Traction Co.* v. *Thalheimer*, Court of Errors and Appeals of New Jersey, March, 1897, 2 Amer. Neg. Rep. 196, it appeared that the plaintiff was a passenger of the appellant, and, having been notified by the conductor that the car was approaching the point where she desired to alight, got up from her seat and walked to the door while the car was in motion, and, while coming through the doorway, she was thrown into the street by a sudden lurch and injured. The court said: "At all events, the fact that such a lurch or jerk occurred, as would have been unlikely to occur if proper care had been exercised, brings the case within the maxim '*res ipsa loquitur*.'" In *Howser* v. *Cumberland & Pa. R. R. Co.*, 80 Md. 146 (1894–5), the plaintiff was injured while walking on a footpath along the defendant's roadbed, but not upon its right of way, by half a dozen crossties which fell upon him from a gondola car attached to a passing train. The court said: "If the presumption arising out of the doctrine of *res ipsa loquitur* finds proper application anywhere, we think this is a case in which it should be applied." Additional recent cases are: *St. Louis Ry. Co.* v. *Neely*, Supreme Court of Arkansas, April, 1897, 2 Amer. Neg. Rep. 492; "*The Majestic*," 166 U. S. 375 (1897); *Shafer* v. *Lacock*, 168 Pa. 497 (1895).

In the case of *Penna. R. R. Co.* v. *MacKinney*, 124 Pa. 462, the Supreme Court of Pennsylvania, quoting with approval the language of the New York Court of Appeals, said:

"It generally happens, however, in cases of this kind, that the same evidence which proves the injury done, proves also the defendant's negligence, or shows circumstances from which strong presumptions of negligence arise, and which cast on the defendant the burden of disproving it. For example, a passenger's leg is broken while on his passage in a railroad car. This mere fact is no evidence of negligence on the part of the carrier until something further be shown. If the witness who swears to the injury testifies also that it was caused by a crash in a collision with another train of cars belonging to the same carrier, the presumption of negligence immediately arises; not, however, from the fact that the leg was broken, but from the circumstances attending the fact. On the other hand, if the witness who proves the injury swears that at the moment when it happened he heard the report of a gun outside of the car and found a bullet in the fractured limb, the presumption would be against the negligence of the carrier."

This question was very ably discussed in the paper books of the case of *Stearns* v. *Ontario Spinning Co.*, Sup. Ct. Pa., Jan. 10, 1898, reported in Weekly Notes of Cases for Feb. 18, 1898. The facts were that an axe-head, after being used for two minutes, flew off, and, falling down an open shaftway, so injured an employe of another company that he thereafter died. Judge Fell refused to apply the doctrine of *res ipsa loquitur*, and sustained the nonsuit

suffered in the court below. The court was unable to see that the mere fact of an axe-head flying off, without proof of further negligence, was sufficient to take the case out of the category of unavoidable accidents. The burden thus thrown on the defendant was not that of satisfactorily accounting for the accident, but merely that of showing that he used due care.

CONTEMPT OF COURT; DEFENSE. The ubiquitous contempt case has again made its appearance in an unusually arbitrary form in *McClatchey* v. *Superior Court of Sacramento County*, 51 Pac. 696 (Cal., Dec. 27, 1897). It carries with it the conviction that the framers of the Constitution did not labor in vain when they declared that freedom of speech and of the press should be inviolate. It also shows the liberal interpretation put upon this clause of the Constitution by the *Sacramento Bee*, the editor of which journal undertook to show wherein his honor, Judge Catlin, had suffered a "gross fabrication" to pass unchallenged. Judge Catlin decided that McClatchey (the editor) had been guilty of constructive contempt, and issued a citation directing him to show cause why he should not be punished therefor. The contemptuous publication alluded to is couched in terse, vigorous English, stamped with an impress unmistakably Western, and reads as follows: "The *Bee* will not keep in its employ a reporter who garbles or who misstates, but when a newsgatherer does his duty and tells the truth, it will not stand silently by while an aggregation of attorneys tries to make him out a liar, and while a prejudiced and vindictive czar upon the bench aids and abets them in such a purpose. The *Bee* re-asserts that in all material details the statement of Tallmadge, as given in the *Bee* of yesterday, was the statement that he made upon the stand at Monday afternoon's session. The *Bee* will go further than that. It will declare that both the attorneys before the bar and the judge on the bench knew that the statement made in the *Bee* was an essentially correct epitome of the testimony given by Mr. Tallmadge at the very moment when they unhesitatingly, shamelessly, and brazenly declared it to be a gross fabrication. There is no paper anywhere that has a higher regard for fair and impartial courts than has the *Bee*, but there is no paper anywhere that has a supremer contempt than has the *Bee* for a judge who will approve the unmitigated falsehood of an attorney, as Judge Catlin to-day approved the brazen misstatement of Judge J. B. Devine." Judge Catlin came to the conclusion that the article contained aspersions on his character derogatory to his judicial position in the community, and acted with a promptness and energy equally characteristic. At the trial the learned judge refused to permit the defendant to show the truth of the statements, but considerately offered to allow him to prove want of malice, which, of course, the defendant refused to take advantage of. The majority of the Supreme Court did not adopt Judge Catlin's view of the case, however, but decided that the refusal to allow the defense of truth deprived the accused

of his constitutional right to be heard in his own defense, and of his right to due process of law, and that the order finding the accused guilty of contempt should be annulled.

The publication of truth as to legal proceedings is not contempt of court: *In re Shortridge*, 99 Cal. 526 (1893). A court possessing plenary powers to punish for contempt, has not the right to summon a defendant to answer, and then refuse to allow the party summoned to answer or strike his answer from the files on the ground that he has been guilty of a contempt of court. *Hovey* v. *Elliott*, 167 U. S. 409 (1896); where the judical history concerning contempt of court in England and this country was reviewed *in extenso*. For contempt cases, *pro* and *con*, see *McVeigh* v. *U. S.*, 11 Wall 259 (1870); *Galpin* v. *Page*, 18 Wall. 350 (1873); *Ex parte Wall*, 107 U. S. 265 (1882); *Brinkley* v. *Brinkley*, 47 N. Y. 40 (1871); *Walker* v. *Walker*, 82 N. Y. 260 (1880).

False Pretence; Obtaining Credit by Fraud. The ballad of the penniless Frenchman who entered a restaurant and, in response to the waiter's query, answered "Vat you please," thereby avoiding any express promise to pay, seemed, perhaps, too absurd to warrant anyone's indulging in speculations as to the *restaurateur's* legal rights. This was the question, however, which the court was called upon to decide in the case of *Regina* v. *William Jones*, 1 Q. B. 119 (Nov. 13, 1897). Lord Russell, who delivered the opinion, stated the facts as follows: "The prosecutor kept an eating house, and on June 20th the defendant went in and asked for some soup; he was told that there was none ready, and thereupon asked for some cold beef; he was told that there was none, but that he could have some cold lamb and salad; and this he accordingly ordered. He then ordered half a pint of sherry, and went upstairs to have his meal; while there he rang the bell, and ordered another half pint of sherry. Subsequently he again rang the bell, and asked what there was to pay; and upon being told four shillings, said that he had no means of paying; that he had no money, and had (as was the fact) only a halfpenny upon him." It was held that he could not be convicted of the offence of obtaining goods by false pretences, but that he was liable to be convicted of obtaining credit by means of fraud within the meaning of sec. 13, sub-sec. 1, of the Debtor's Act, 1869.

Cases are not wanting to the effect that there can be false pretence by conduct. Wearing a cap and gown to convey the false notion that he was a member of the university was held to be false pretence: *Rex* v. *Barnard*, 7 C. & P. 784 (1837). And a promise to do a thing *in futuro* may involve the false pretence that the promisor has the power to do that thing: *Reg.* v. *Giles*, L. & C. 502 (1865); *Reg.* v. *Jackson*, 3 Camp. 370 (1813); *Rex* v. *Crossley*, 2 M. & R. 17 (1837); *Reg.* v. *Hazleton*, L. R. 2 C. C. 134 (1874); *Reg.* v. *Murphy*, 13 Cox 298 (1876).

CORPORATIONS; EXCESS OF DEBT; VALIDITY. *Smith* v. *Ferries & C. H. Ry. Co.*, 51 Pac. 710 (Cal.) (Dec. 28, 1897), decided a question which, though not entirely new, is not settled, and is of much importance to those dealing with corporations. The complainant, a stockholder in the defendant corporation, alleged that the directors had issued bonds to an amount which violated the provision of the Civil Code, § 309, that directors of corporations must "not create debts beyond the subscribed capital stock." The substance of the prayer was that said unlawful increase be declared void and the earnings applied to other purposes. While the court held, on somewhat unsatisfactory reasoning, that there was no excess of debt, they further held that, even if such excess existed, the bonds representing it would not be void, and referred to the previous case of *Underhill* v. *Santa Barbara, Etc., Co.*, 93 Cal. 300 (1892). The court in this case considered that, as a subsequent section of the Code provided a remedy by the corporation or its creditors against directors violating § 309, the intent of this latter section was not to invalidate such obligations, and enforced the obligations then in question. Statutes more or less similar to that of California have been passed in District of Columbia, Illinois, Maine, Massachusetts, Maryland, Mississippi, Michigan, New York, Rhode Island and Utah. While in some of these the legislature has expressly enacted that a remedy shall exist against the corporation, in others the statutes are silent; but even in the latter class there seems a decided tendency on the part of the courts to hold the corporation liable to suit on all the obligations issued: Thompson on Corporations, § 4267; *Wolverton* v. *Taylor*, 132 Ill. 210 (1890), and to treat the liability of the directors as an additional security: *Hornor* v. *Henning*, 93 U. S. 231 (1876). Such a construction of these statutes is, in view of the fact that it is impossible for parties dealing with corporations to learn their exact indebtedness, and also because it tends to prevent fraud on the part of the corporations themselves, the only just construction possible; and it, moreover, is well supported on principle. To sustain this latter statement it is but necessary to recall the well settled rule, that a corporation, unless restrained by its charter, may contract debts and issue obligations the same as an individual: *Barry* v. *Merchants' Exchange*, 1 Sandf. Ch. 280 (1844); *Jones* v. *Guaranty Co.*, 101 U. S. 622 (1879). This being so, a statute should not be construed so as to take away this power unless the language is clear to that effect. But the language generally used in the statutes is not prohibitive. The phrases most usually occurring are: "If the indebtedness *exceeds* the capital stock, the directors shall be liable," etc.; or, "the *directors* shall not issue obligations in excess of the capital," and similar expressions. To give such expressions as these a construction exempting a corporation from direct liability on bonds, mortgages and other securities, which are nowadays issued to such enormous extent, would be to reach a result probably never intended by the framers of these statutes, as