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 JAMES H. LANGSTROTH, at S. W. Cor. Thirty-fourth and Chestnut Streets, Philadelphia, Pa. Address all literary communications to the EDITOR-IN-CHIEF; all business communications to the TREASURER.

The article entitled "Has the Study of Law a Place in a Liberal Education," which appeared in our June number, was written by Dr. W. Draper Lewis, Dean of the University of Pennsylvania Law School. Through an oversight the name of the author was omitted.

IN MEMORIAM.

WILSON STILZ.

Wilson Stilz, a member of the Board of Editors of the AMERICAN LAW REGISTER, died on June 13, 1900. Mr. Stilz was a member of the second year class in the Department of Law of the Univer-

sity of Pennsylvania. He prepared for college at Eastburn Academy, Philadelphia, and graduated from that institution with the highest grade ever attained in its history.

Mr. Stilz graduated from the College of the University in 1898, receiving the degree of Bachelor of Science in Economics. His work at College showed his great ability as a student—for each of his four years of study he was awarded "Honors" by the Faculty, in Junior year taking the Terry prize for standing first in his class, and his graduating thesis on "Railroad Co-operation" was published by the University.

Mr. Stilz, in his first year at the Law School, divided with another member of his class the prize for standing at the head of the class. In his second year Mr. Stilz was taken ill just previous to the examinations.

CONTRACT—RES ADJUDICATA—JUDGMENT A BAR TO SECOND SUIT UPON SAME CAUSE OF ACTION—WAGES. In *Alie* v. *Nadeau*, 44 Atl. 891, (1899), defendant had agreed to hire plaintiff for six months from November 9, 1897, at $10 per week, payable weekly; but on January 15, 1898, plaintiff was discharged by defendant, without lawful cause; his wages, however, having been paid in full up to that date, March 12, 1898, plaintiff brought suit against the defendant to recover damages for his breach of contract, and claiming damages to the date of his writ, March 12, and ultimately recovered damages for an amount equal to the weekly wages agreed upon from January 15 to March 12, 1898. The present action was commenced November 23, 1898, upon the same breach of the same contract, and with intent to recover from defendant damages, from March 12, 1898 to May 9, 1898, the remainder of the period covered by his contract with plaintiff.

The question for decision was whether or not the former judgment was a bar to recovery. Savage, J., decided that it was, and that for a single breach of contract there can be but a single recovery. The plaintiff was, in his former action, "entitled to recover all the damages he sustained by the breach, both present and prospective, and for such a breach but one action can be maintained. *Sutherland* v. *Wyer*, 67 Me. 64, 1877. It is to be PRESUMED that in his former judgment he recovered all he was entitled to receive for the breach."

The case is a clear illustration of Sedgwick's "Elements of Damages," Rule 21: "For a single cause of action all damages incident to it must be assessed in a single suit," but it raises some interesting questions. Plaintiff argued that the contract was devisible, or continuing, and that therefore he could apportion his damages; but the court followed *Sutherland* v. *Wyer* (supra), where it was decided in accordance with the great weight of authority that such a contract of employment was an entire contract, and that therefore damages must be assessed for a breach of it in a single action. *Parker* v.

Russell, 133 Mass. 74, (1882). *Wichita & W. R. R. Co.* v. *Beebe*, 39 Kas. 465, (1888). In case of a final and conclusive breach of such a contract, as by a discharge, the party discharged is exonerated from any further performance of the contract, and may sue at once for such damages as he has sustained by the breach. He need not wait until the expiration of the period covered by the contract, nor is it necessary for him to tender his services or hold himself in readiness to perform for any length of time at all, but he may sue at once. *Howard* v. *Daly*, 61 N. Y. 362, (1875); *Dugan* v. *Anderson*, 36 Md. 567, (1872). In *Sutherland* v. *Wyer* (supra), plaintiff was discharged January 8, and brought suit January 11, when nothing whatever was due him according to the terms of his contract, and he was allowed entire damages.

In such cases the damages which plaintiff is entitled to recover include not only damages actually sustained when the action was commenced, or at the time of the trial, but also whatever the evidence proves he will be likely to suffer thereafter from the same cause. *Remelee* v. *Hall*, 31 Vt. 582, (1859). This represents the great weight of authority, but for a Wisconsin case contra, see *Gordon* v. *Brewster*, 7 Wis. 355, (1857).

The amount of such damages is not speculative, but is to be determined by the jury, in accordance with the following rules: *Pima facie*, the amount of damages is the amount of the stipulated wages for the remainder of the period; if the time of the trial is after the expiration of the period covered by the contract, the jury must deduct from the above amount what the plaintiff has earned during that period since his discharge, or what they think he might with proper diligence have earned; or, if the suit is brought and trial held before the expiration of the period covered by the contract, the jury must deduct such earnings of the plaintiff, and also what they think he may with proper diligence earn before the expiration of such period. The sum which remains, with interest, will be the proper measure of damages. The injured party must do all he reasonably can and improve all reasonable and proper opportunities to lessen the injury. *Miller* v. *Mariners' Church*, 7 Me. 51, 56, (1830), 2 Greenl. Ev., § 261; *Chamberlin* v. *Morgan*, 68 Pa. 168, (1871), Sedg. on Dam. (sixth edition) 416, 417.

The burden of proof is on defendant to show, in mitigation of damages, that plaintiff found employment elsewhere, or that other similar employment was offered and declined, or at least that it might have been found, with reasonable diligence, or that plaintiff may yet find employment elsewhere, as the case may be.

In any case where plaintiff has already brought suit and recovered judgment for such breach of contract, such judgment is presumed to include all that he is entitled to receive for that breach. So long as the judgment stands, the plaintiff cannot bring another action for the same cause. *Nashville, etc., Railway Co.* v. *United States*, 113 U. S. 261, (1884); *Gould* v. *Sternberg*, 128 Ill. 510, (1889). And this is the law whenever judgment is given in an action, whether by consent or by decision of the court. *Ex parte* Bank of England, (1895) 1 Ch. 37. The mere bringing of an action, however, does

not discharge the right to bring the action. Pendency of action in one state does not bar an action in another state, or in the Federal Courts. *Pierce* v. *Feagans*, 39 Fed. Rep. 587 (1889); *Stanton* v. *Embrey*, 93 U. S. 548, (1876); *McJilton* v. *Love*, 13 Ill. 486, (1851). But a plea of the pendency of an action is a good plea in abatement to another action upon the same breach of the same contract in courts of the same jurisdiction. *Bendernagle* v. *Cocks*, 19 Wend. 207, (1838).

In *Alie* v. *Nadeau*, the court says where the defendant has contracted to pay plaintiff his wages weekly, and makes default in such payment, plaintiff can maintain "an action for services performed on each failure of the defendant to pay as he agreed." That is to say, if defendant owes plaintiff a week's wages on March 6, and fails to pay the same, plaintiff can bring suit for the amount on March 7, and need not wait until the expiration of the period covered by the contract of employment in this case, any more than in the former. And if a second week's wages falls due on March 13, and is unpaid, a second suit may likewise be brought on March 14, and so *ad libitum*. This part, therefore, of the contract of employment, namely, the agreement to pay, is divisible, while the former, the agreement to employ, is indivisible or entire. Whether a contract is divisible or entire, or, in other words, whether a breach of it may give rise to several suits or to but one, depends upon the question whether by such breach the contract is at once brought to an end, or in spite of the breach continues in effect. When an employer discharges his servant contrary to contract, the contract is thereby at once repudiated and at an end, and the breach is final and conclusive, and there can be but one action therefor. But where the breach is the mere failure to pay stipulated wages, each such breach is separate and single, and by itself a cause of action. It is a breach merely of a part of the contract, while the contract itself as a whole continues. For a week's wages, too, if unpaid according to the terms of the contract, the employee is entitled to waive the contract and sue *in indebitatus assumpsit*, for a *quantum meruit*, or the value of so much as he had done. So the services rendered each week, of themselves, constitute a separate cause of action, while the employer's breach of the contract by discharge, as above, is at once a single breach of an entire contract; suit can be brought only on the special or express contract, and plaintiff is entitled to but one such suit.

If at any time, however, in suing for failure to pay weekly wages, the plaintiff sues for a part only of the sums due, a judgment will be held to be satisfaction of all the sums which could have been included in that action, and were due and payable by the terms of that contract; and therefore no further suit can be maintained on any of them. The reason for this rule is the prevention of unnecessary and oppressive litigation; Parsons on Contracts, III, *188.

In all cases the question is, what is the cause of action? All damages arising from a single cause of action must be assessed in a single suit.

WORDS EXPRESSING TESTAMENTARY INTENTION.—*Webster* v. *Lowe*, 53 S. W. Rep. 1030, (Kentucky, November 23, 1899). This was a contest of the alleged will of James Lowe, deceased. The paper, a part of which was offered for probate in the Kentucky courts, was in the handwriting of the decedent and was found among his effects after death.

In its entirety, the document is a brief life-history of the writer, reciting as it does the date of his birth; how he came from England to New York in 1839; his going to Piqua to reside, teaching school part of the time, etc., etc. The items offered for probate occur just subsequent to a statement of the purchase of "the property on Third and Main streets," and its rental by deceased to his son-in-law, "Charlie" Webster, and read as follows: "He has done much improvements about it, and *I have requested my executors to give a clear deed for the property, after my death, to Maggie, his wife, and Charlie.*" In addition to the document itself, parol evidence was introduced showing that the deceased had made at least two wills prior to this paper, and had in each devised the property described to Webster and wife.

The Court of Appeals agreed with the lower court in holding that the two former wills last seen in custody of the testator, and not found after due search, are presumed to have been destroyed by the testator *animo revocandi*, [citing *Mercer* v. *Mercer's* Adm., 87 Ky. 21, (1888)]. This is so unquestionably true, and such familiar law, as to require no comment. Jarman on Wills, Vol. I, page 290, and the many cases there cited in the notes; Am. and Eng. Encyclop. of Law, Vol. 13, page 1094, note.

The sole question before the court, therefore, was as to whether the paper above referred to is itself a will. This question, the Appellate Court, reversing the lower tribunal, answered in the affirmative.

The court support their decision for the will on the broad and indisputable proposition that "The law does not require it should assume any particular form, or that any technically appropriate language should be used therein, if the intention of the maker is disclosed and the destination of his property at his death is described"; and in application of this principle we find, a little further along in the opinion, the assertion that "the language used by the testator shows that it was his purpose that the title to the property should vest in Webster and wife, after his death." Therefore, says the court, this paper, satisfying as it does the Kentucky statutes on execution, is a will.

This conclusion will scarcely bear a close scrutiny. Granting to the uttermost the interpretation of the court upon the question of fact presented,—the question, namely, as to the meaning of the words probated,—that interpretation will be seen to support nothing more than the proposition that at the time of the writing the deceased was of a mind to leave his property to "Charlie." We will not stop to quibble as to whether or not the words "I *have* requested my executors," etc., are indicative of a *present* frame of mind; but conceding that the deceased would have answered any

questioner as to his intent by a flat-footed statement that he meant "Charlie" to have all, we yet fail to see how that fact makes the document a will. A present testamentary intent is not a will, nor does it become such by reason of the fact that its existence is to be gathered from a paper duly signed, etc., so as to satisfy the "will's act" of the jurisdiction. The paper is a will *only* if it was intended *to operate* as such. It is by following cases that may, at first glance, seem contra to this broad truth, that the Kentucky court seems to have gone astray.

It is true, as the opinion points out, that a promissory note, payable after the maker's death and delivered by him to his nephew without other consideration, has been sustained as a testamentary, provision. *Jackson* v. *Jackson's* Adm., 6 Dana 257, (1838); that an instrument disclosing the intention of the maker respecting the posthumous destination of his property and not to operate until after his death is a will, though it be "in the form of a deed, signed, sealed and delivered as such." *Johnson* v. *Yancey*, 20 Ga. 707, (1856); that an endorsement by a payee,—"If I am not living at the time this note is paid, I order the contents to be paid to A," and signed, is a will. *Hunt* v. *Hunt*, 4 N. H. 434, (1828); etc., etc. It is not intended for a moment to discredit these opinions, but simply to deny their availability as standing contra to the rule that a document is a will only when the testator so intended it. A testator may *think* he is making a promissory note, or a deed, or what not, and the instrument yet be a *will*, the requirement that he so *intend* it being satisfied by his intent to dispose of property *by that very instrument* and in such a manner that the *court* will say, "This is a testamentary disposition." In the words of the Am. and Eng. Enc. of Law, Vol. 29, page 138, referring to such cases: "The requirement that the instrument be written *animo testandi* does not mean that the testator meant to write his will when he sat down to write it, but that he intended the instrument *to be operative* . . . and *to effect by it* such a disposition of his property as would be in its legal effect testamentary." See also Schouler on Wills (second edition), § 272, and Redf. on Wills (fourth edition), 171.

We think it plain, that in the case under discussion there is no expressed or fairly implied intent *to effect by the instrument in question* any disposition of property. "I have requested my executors to give a clear deed," etc. These are the words. That they merely recite a *past* act is obvious, doubly so when we recall that the paper in its entirety is but a narrative review of the decedent's life and doings. Why then consider the clause in question less a mere recital of past happenings than are the other parts of the document? Can we ignore the logical connection of the sentence probated, to say nothing of going flatly contra to its grammatical construction, and call it a present disposition of property? Suppose the words had been, "I *shall* tell my executors to deed the property to Charlie," and that this clause had been among many connected statements of what the writer purposed doing in the future. Would this be a will?

Think for a moment of the consequence involved of necessity in the Kentucky decision. A makes a will giving his house to B. The

next day A writes in his diary, "I have left my house to B." A week or a month, or it may be ten years later, A dies and the original will is not found. The presumption, admitted by the Kentucky tribunal, is that this will has been destroyed, and yet, in the face of this admitted intent to revoke, we are asked to hold the diary entry of itself a will. In other words, we have the curious result, that in order to revoke a will by destruction, the testator must cancel not alone the original testamentary document but also every subsequent recital, in letter, journal, or momorandum, referring to the past disposition made. This result we cannot accept as a sound exposition of a system of law that has been nothing if not practical and common sense in its principles.

Because, therefore, of the grammatical structure of the sentence probated, wholly in the past tense as it is; and because of the connection in which the words are found, as part of a narrative life history; it does not seem reasonable to hold for a moment that the writer meant by the very document in question to make a disposition of his property. This conclusion is but strengthened by the quondam existence of the wills to which the later narrative might well have referred. Then, finally, the *reductio ad absurdum* to which the Kentucky decision would lead us in the matter of revocation adds the weight of expediency to that of principle in forcing the conclusion that the justice of an individual case has led the court in *Webster* v. *Lowe* to find a testamentary intent where no testamentary words warrant the finding.

MUNICIPAL BONDS; DEFENCES; JUDGMENT AS ESTOPPEL; RECITALS.—*Geer* v. *Board of Ouray County*, 97 Fed. 435, (1899). This was an action brought in the Circuit Court for the District of Colorado, by the holder of bonds of Ouray County, to enforce the collection of overdue coupons. He alleged that the county was indebted to various persons who had recovered judgments against it to the amount of $200,000; that bonds were issued in payment of the judgments in accordance with a statute, and came into the hands of the plaintiff for value; that the bonds contained the following recital: "This bond is issued by the board of county commissioners of Ouray County, under and by virtue of an act of the General Assembly of the State of Colorado, entitled 'An Act to enable the several counties of the State to refund their bonded debt which has matured or may hereafter mature, and to issue bonds in satisfaction of judgments and matured bonds'." To this action the county pleaded eight separate defences. A demurrer to all was sustained. The sixth and seventh defences were amended. A demurrer to the sixth was overruled, and a demurrer to a replication to the seventh was sustained. Both parties appealed.

Only two questions, those raised by defences six and seven, are of any great importance. On the former it was stated that the debts of the county, upon which the judgments were rendered, were invalid because in excess of the constitutional power of the county

to incur debts, and that the validity of the claims was not adjudicated in the actions in which the judgments were given.

In answer to this the court said the debts must necessarily have been determined to be valid when judgments against the county were given. Geer, the plaintiff, holding bonds issued in payment of the judgments stood in privity with the plaintiff in the judgment suits, and could rely upon every presumptive and estoppel to which they were entitled. "In an action between the same parties, or those in privity with them, upon the same claim or demand, a judgment upon the merits is conclusive, not only of every matter offered, but of every admissible matter which might have been offered to sustain the claim or demand." The court referred to language used in a previous case. "In an action to enforce the collection of a judgment or the collection of bonds or coupons issued in payment of a judgment against a municipal or quasi-municipal corporation, the judgment conclusively estops the corporation from making the defence that the original indebtedness evidenced by it was in excess of the amount which the corporation had the power to create under the limitations of the constitution of the state in which it was incorporated." See *Board* v. *Platt*, 79 Fed. 567, (1897), and cases there cited.

The question presented by the seventh defence gave rise to a dissenting opinion by Judge Caldwell. The defence was that there never were any judgments against the county in payment of which the bonds were issued. The court admitted this to be a good defence against an original creditor who had accepted the bonds without obtaining any judgment. But it was not good against a bona fide holder of the bonds who bought in reliance upon the recital. Such recital operated as a complete estoppel. "The existence of the judgments was a condition precedent to the exercise of the power to issue bonds,—a condition whose existence it was the duty of the board to ascertain before it issued them." The recitals "preclude inquiry, as against innocent purchasers for value, as to whether or not the precedent conditions had been performed when the bonds were issued." A long line of cases are then cited which, in the main, support the majority view.

Judge Caldwell referred for the reasons of his dissent to the case of *West Plains* v. *Sage*, 69 Fed. 943, (1895). Then a township issued bonds purporting to be in pursuance of a statute giving it power to issue bonds to refund old indebtedness. The bonds recited the statute and the purpose of the bonds to refund debts, and that all the requirements of the statute had been complied with. In reality they were issued to build a sugar factory. In a suit by a bona fide holder the township was estopped to deny the validity of the bonds. Caldwell rested his opinion on the ground that the bonds were non-negotiable. He argued that municipal corporations were merely state agencies for local purposes, and that they had no power beyond that expressly or impliedly granted them. The power to borrow money did not include the power to issue negotiable bonds. The power to issue bonds as stated in this act did not give power to issue negotiable bonds, therefore the plaintiff was not a holder for

value. In support of his view he cited *Merrill* v. *Monticello*, 138 U. S. 673; *Hill* v. *Memphis*, 134 U. S. 198; *Brenham* v. *Bank*, 144 U. S. 173. But in these cases there is given no power to issue bonds, but merely the power to borrow money. They hold that the power to issue negotiable bonds is not to be inferred from the limited borrowing power.

The majority view in these two cases is supported by reason and authority. The power to issue bonds means negotiable bonds, because in its ordinary signification a bond is a negotiable instrument; many legitimate public purposes could not be effected except by issuing such certificates of indebtedness. Furthermore, by declaring a municipal corporation estopped from setting up as a defence that bonds were issued for an illegal purpose, such purpose is effectually checked. *See National Life Ins. Co.* v. *Board*, 62 Fed. 778; *Jasper Co.* v. *Ballow*, 103 U. S. 745; *Board* v. *Howard*, 83 Fed. 296.

In *Rollins* v. *Board*, 80 Fed. 692, (1897), the rights of a purchaser of bonds were considered. His position is the same as that of the ordinary purchaser of commercial paper. "A bona fide holder of commercial paper is entitled to transfer to a third party all the rights with which he is vested, and the title so acquired by his indorsee cannot be affected by proof that the indorsee was acquainted with the defences existing against the paper."