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NOTES.

CORPORATION—FORFEITURE OF CHARTER BY NON-USER.—Mr. Justice Story, in the case of *Terrett* v. *Taylor*, 9 Cranch 43 (1815), pronounced the doctrine that "a private corporation created by the legislature may lose its franchises by a misuser, or a non-user of them, and they may be resumed by the government under a judicial judgment upon a *quo warranto* to ascertain and enforce the forfeiture." This principle, affirmed years afterward by the same learned jurist in *Mumma* v. *Potomac Co.*, 8 Peters 287, has been recognized and followed in all jurisdictions, a corporation by its very nature being restricted to certain standards of duty and specified lines of procedure, in derogation of which it forfeits its right to existence. Presumably corporations are created by the legislature and sanctioned by the courts for purposes of public benefit; their charters are drawn with this object in

view; and when they become guilty of any act seriously disqualifying them for such service, they become not only no longer useful, but often actively dangerous entities.

Accordingly an insurance company,[1] or a bank,[2] may be restrained from further carrying on business upon grounds of insolvency; or, in the case of a bank, because of a refusal to redeem its issues in specie,[3] where such refusal was not shown to be the result of temporary inevitable necessity.[4] Where, however, insolvency is the reason assigned, it must be shown to be of a permanent character; a mere temporary insolvent condition at any particular time is hardly sufficient cause for so drastic a remedy.[5] Logically, then, where an industrial corporation suspends operations, financial inability to proceed will be held no excuse,[6] though a misfortune, due to a bona fide accident or mistake, may sometimes serve as a sufficient answer,[7] if a substantial performance with the terms of the charter is shown.

The courts, as a rule, show the utmost discretion in the exercise of this function, particularly where the dereliction is one of omission rather than of commission. The non-user complained of must be of the essence of the contract between the corporation and the state.[8] A wrongful intention must be shown, such an abuse of the confidence of the state, according to a New York case,[9] as would justify the displacement of a trustee; though a corrupt or bad motive is not essential; it is enough if the duties be knowingly or designedly omitted.[10] Nor will the courts permit any of these defections to be taken advantage of in a collateral proceeding, where it has not already been adjudged a ground of forfeiture. There must be a trial and judgment upon the issue before a franchise will be removed.[11]

Even where there is an express provision in a legislative act, which the corporation has transgressed, it will not thereby be *ipso facto* dissolved; no such dissolution can take place without the decree of a court of competent jurisdiction.[12]

How far a mere partial non-user of the duties and privileges

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[1] *Chicago Life Ins. Co.* v. *Needles*, 113 N. S. 574 (1884).
[2] *State* v. *Real Estate Bank*, 5 Ark. 595 (1843).
[3] *People* v. *Dubois*, 18 Ill. 334.
[4] *State* v. *Real Estate Bank*, *supra*.
[5] *People* v. *Hudson Bank*, 6 Cow. (N. Y.) 217.
[6] *People* v. *Plainfield Ave. Gravel Road Co.*, 105 Mich. 9.
[7] *People* v. *Kingston etc. Turnpike Co.*, 23 Wend. (N. Y.) at p. 210.
[8] *Com.* v. *Commercial Bank*, 28 Pa. 383 (1857).
[9] *People* v. *Atlantic Ave. R. R. Co.*, 125 N. Y. 513.
[10] *People* v. *Kingston etc. Turnpike Co.*, *supra*.
[11] *Dyer* v. *Walker*, 40 Pa. 157 (1861).
[12] *Sleeper* v. *Goodwin*, 67 Wis. 577.

conferred will operate as a cause for dissolution is a matter of some uncertainty, varying more or less with the nature of the business to be carried on.

A railroad, which suspends operation for the space of a year, will be dissolved, under a statute, at the instance of the attorney-general.[13] And where a railroad fails to construct its entire line as required by law, but condemns private property and builds only such part of its system as will be beneficial to certain large stockholders, its franchise may be cancelled.[14]

On the other hand, an insurance company which refuses to take extra-hazardous risks,[15] a manufacturing company which produces only one of the several articles permitted in its charter,[16] or a college one of whose departments has fallen into partial decay merely because of refusal of students to enter the course, have been held not guilty of wilful non-user.[17]

In all of these cases, however, an intention was shown substantially to perform the terms of the charter; apparently it is the practice of the court to examine in each case the motive, as well as the cause, of the dereliction. It is doubtless largely upon this basis that the Supreme Court of Missouri gave its decision in *State on inf. Hadley, Atty-Gen.* v. *Delmar Jockey Club*, 98 S. W. 539. The corporation, in this case, had obtained a franchise authorizing it to promote agriculture, establish and maintain suitable fair-grounds, and give and conduct races and public exhibitions of agricultural products and stock. The fair-grounds were established, but for five years they were never used for anything except race-meets, and the court, on the information of the attorney-general, decreed the charter forfeit, on the ground that the main purpose and object of incorporating the club had been to promote the study of agriculture, and that this purpose was in no way fulfilled by merely conducting a series of horse-races.

POLICE POWER OF THE LEGISLATURE—REGULATION OF HEIGHT OF BUILDINGS.—The power of the legislature to interfere with what has always been claimed as the inherent rights of property-owners is universally admitted wherever the safety or health of a large portion of the community is

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[13] *State* v. *Minnesota Central R. R.*, 36 Minn. 246.
[14] *State* v. *Hazleton etc. R. R.*, 40 Ohio 504.
[15] *State* v. *Urbanna Ins. Co.*, 14 Ohio 6.
[16] *Cotton Mills Co.* v. *Burns*, 114 N. Car. 353.
[17] *State* v. *Farmers' College*, 32 Ohio 487 (1877).

involved. For over a century[1] it has not been denied that either a state or a municipal assembly can pass an ordinance restricting[2] or prohibiting[3] the building of frame structures within certain prescribed "fire limits" of a town, and legislation has been held constitutional which excludes from certain thickly-populated districts any building used as a slaughter-house, or for other noxious or offensive trade.[4]

The reasons for such provisions are too obvious to require comment. But a more serious difficulty arises, and a finer line of demarcation must be drawn, when it is attempted to increase the total amount of space, light and air in a city or town by restrictions as to the size and location of buildings. An old Pennsylvania case[5] holds a statute constitutional prohibiting the erection of any new dwelling-house on a street, alley or court of a less width than twenty feet, and the start thus given was afterwards taken advantage of in the same state when the question arose as to whether it was competent to prescribe the distance from the curb to the building-line. An ordinance providing for such a measurement was held constitutional, where it allowed due compensation to property-owners for the land appropriated;[6] and it was apparently only because of the absence of this latter provision that the Supreme Court of Missouri failed to sanction a similar enactment.[7]

Altogether, it appears to be clearly established that a municipal corporation may decree any width for its streets, and restrict the building line accordingly. Where, however, the question presents itself not as to the location, but as to the height, of the building, authorities are fewer and more conflicting. An Act of the New York Assembly limiting the height of tenement-houses to eighty feet on streets and avenues exceeding sixty feet in width was held constitutional,[8] the motive underlying it being interpreted by the court to be a desire to minimize the danger in case of fire.

The Massachusetts legislature have gone further, and passed a statute limiting the height of buildings erected near Copley Square, Boston, the obvious intention being to increase the total amount of light and air in the district; and this was

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[1] *Republica* v. *Duquet*, 2 Yeates (Pa.) 492 (1799).
[2] *City of Salem* v. *Maynes*, 123 Mass. 372 (1877); *Ex Parte Fiske*, 72 Cal. 125 (1887).
[3] *Klingler* v. *Bickel*, 117 Pa. 326 (1887).
[4] *Inhabitants of Watertown* v. *Mayo*, 109 Mass. 315 (1872).
[5] *In re Perry's Court*, 10 Phila. 27 H (1873).
[6] *City* v. *Linnard*, 97 Pa. 242 (1881); *In re Chestnut St.*, 118 Pa. 593 (1888).
[7] *St. Louis* v. *Hill*, 116 Mo. 527 (1893).
[8] *People* v. *D'Oench*, 111 N. Y. 359 (1888).

sanctioned by the court.[9] That the action was still for purposes of health rather than of beauty, is, however, proved by the refusal of the same court to give force to a regulation of park commissioners, passed by virtue of powers granted them by a legislative enactment, prohibiting the erection of signs within view of pedestrians in the park.[10] Here again there was no compensation provided for the property rights infringed—and indeed it is difficult to see how there could be—and the court intimated that a regulation including this provision, and properly restraining the erection of signs, might be constitutional.

The recent action of the same court in the case of *Welch* v. *Swasey et al.*, 79 N. E. Rep. 745 (1907), is particularly interesting in the light of this latter *dictum*. The regulation contested in the case was passed by commissioners, acting under legislative powers, prohibiting the erection of a building in a residence district in Boston of a greater height than eighty feet unless its width on each street on which it stands be at least one-half its height. The Supreme Judicial Court held that the regulation and the statute permitting it were constitutional, and while not passed for purely æsthetic reasons, would be none the less so, under the circumstances, if they were. This, again, is nothing more than an expression of opinion, but it is of so strong a character as to show a tendency toward upholding legislation looking toward the beautifying of our cities.

DUTY OF CARRIERS IN DISCHARGING PASSENGERS.—A case of considerable practical importance has been lately decided by the Court of Appeals of Kentucky. In *Louisville City Ry. Co.* v. *Hudgins* (98 S. W. 275) a passenger on plaintiff's car had alighted and walked behind the car to cross a parallel track, of the plaintiff's when she was struck by a car on the parallel track, and sued for injuries caused thereby. The court below charged the jury that—

"If you shall believe from the evidence that at that time she failed to exercise ordinary care for her own safety, and, by reason of such failure she helped to cause or bring about the injury of which she complains, and that she would not have been injured but for her failure in that respect, if any there was, then the law is for the defendant, and you should so find unless you shall believe from the evidence that the employees of the defendant on its east-bound car could have seen the

[9] *Atty-General* v. *Williams*, 174 Mass. 476 (1899).
[10] *Commonwealth* v. *Boston Adv. Co.*, 788 Mass. 348 (1905).

plaintiff by the exercise of ordinary care when she came in peril from the car, and, by the exercise of ordinary care, could have prevented the injury which the plaintiff alleges she sustained; if they could, then the law is for the plaintiff, and you should so find."

and this was the ground of appeal. The decision was affirmed, the court saying that—

"It was of course the duty of appellee, when she started to cross the tracks, to exercise ordinary care for her own safety, but, although she failed to do this and her failure may have contributed to such an extent to bring about the injury of which she complains, that it would not have happened except for her failure to exercise this degree of care, will not relieve the appellant of liability if the persons in charge of the car that struck her could, by the exercise of ordinary care, have discovered the peril appellee was in, and, by the exercise of ordinary care, have prevented the injury to her.

It is doubtful if such a case would go the same way in Pennsylvania, and in one case where the facts were practically identical the court non-suited the plaintiff on the ground of contributory negligence. The alighting passenger did not stop before crossing the parallel track, and the evidence was that he looked straight ahead and that he could have seen the approaching car had he looked, in which event he might have stepped in between the two cars and been safe. As a matter of fact exactly the same thing could be said about the passenger in the former case. The court says:

"Though the stop, look and listen rule does not apply to city railroads, yet it is plain that a man must look where he is going."

and the non-suit was affirmed.

The difference which, it is submitted, plainly exists in fact if not in the words used in the respective charges of the courts may be explained perhaps by the fact that in Kentucky the doctrine of the last clear chance exists and in Pennsylvania it is not recognized at all.

The Kentucky court says:

"When a car has been stopped at the usual place for discharging passengers, it is the duty of those in charge of an approaching car on the other track to have it under such control that it may be stopped at a moment's notice, so that persons who have alighted may cross the track safely."

In other words, the car must be so carefully run that the railroad may be able to avert an accident even though a passenger may be careless; but no such duty apparently rests on the trolley company in Pennsylvania.

In the case of steam railroads when a passenger injured at one of the railroad's platforms where he has of course a perfect right to cross the track, the Pennsylvania courts seem

to put a greater duty of care on the railroad. This may be explained by the fact that in the case of a trolley company it has no control over the crossings, while a railroad has complete control over such platforms as the ones in question; and further by the fact that railroad companies have certain rules not enforced by a trolley company which a passenger may rely upon. In *Betts* v. *Lehigh Val. R. R.*, 191 Pa. 575, a passenger was struck by a train while crossing the tracks over the regular platform to get to his own train standing at the station. The train which struck him was run past the station in violation of a well-known rule of the company forbidding one train to approach when another was stopping at the station. The court held a passenger could properly rely on such a rule and need not stop, look and listen to avoid being guilty of contributory negligence, though here as always he must use reasonable care.

A former Pennsylvania case, *Pennsylvania R. R.* v. *White*, 88 Pa. 327, and the United States Court's case of *Warner* v. *B. & O. R. R.* in 168 U. S. 339, seem to be in perfect accord with the first Pennsylvania case.

While it may be difficult to cite any definite words in the steam railroad case which can be said to put a lighter duty of care on the passenger, who must in both cases use "reasonable care," yet it is quite evident that as a physical fact more care is required of a passenger in the trolley case than in the railroad case, and that the court will be more inclined to take the former case away from the jury on the ground that contributory negligence exists.