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## NOTES.

BANKS AND BANKING—COLLECTION OF DRAFT—WHEN TITLE PASSES.—A corporation deposited with an Indianapolis bank, a draft on a Baltimore company. As between the depositor and the bank, it was customary for the latter to enter each draft to the company's credit as cash, the proceeds to be subject to check as soon as entered on the company's pass-book. Having so entered the draft in suit, the bank sent it to a Baltimore bank for collection. The drawee paid it, but later in the same day sought to hold the Baltimore bank as garnishee on a foreign attachment taken out against the original depositor of the draft. The Baltimore bank pleaded *nulla bona*, and judgment was rendered in its favor, the court holding that title to the draft had passed to the Indianapolis bank at the time of deposit.[1]

As pointed out by the court, there are two previous Maryland decisions on much the same question, in both of which it is said, though by way of dictum, that, under similar circumstances, title passes from the depositor to the bank, when the indorsement is in

[1] Auto and Accessories Mfg. Co. v. Merchants' National Bank, 81 Atl. Rep. 294 Md. (1911).

blank or to the bank itself.[2] In the present case there was a general indorsement to the bank, and this fact, coupled with the additional facts that the amount of the draft was immediately credited to the depositing company as cash, and could be drawn upon at once, were considered as controlling the situation, there being no evidence to show that the parties looked upon the transaction in a different light. There was also the positive testimony of the cashier of the Indianapolis bank to the effect that the bank treated such drafts of the depositor as discounts, though he did not state that they were actually discounted. But although this was the practice of the bank, there was no agreement with the company that it should be done.

The decision of a question such as is raised in the principal case depends largely on the presence or absence of certain facts, which may, by themselves, seem unimportant, but are, when taken together, the turning points of the decisions. A specific agreement between the bank and the depositor that the proceeds of the latter's drafts shall be credited to him at once as cash—the discount being deducted—is recognized as constituting a sale of the paper to the bank. On the other hand, if there was no such agreement, and the depositor indorsed the paper "for collection and credit to" himself, the courts consider such a transaction as a bailment or trust, and hold that title to the draft does not pass to the bank upon its deposit.[3] But there are cases which lie between the two classes just noticed; and it is with these that the courts have some difficulty. Where a depositor sends a check or draft to his bank marked "for deposit to the credit of" himself, and the amount is credited to him as cash, he having the right to draw against such deposit, it has been considered that title to the draft passed absolutely to the bank, though there was no specific agreement between the parties on the matter.[4] The court in the Minnesota case just referred to, citing a prior case in that State, said: "Upon a deposit being made by a customer in a bank, in the ordinary course of business, of money, checks, drafts, or other negotiable paper received and credited as money, the title of the money, drafts, or other paper immediately becomes the property of the bank, which becomes debtor to the depositor for the amount unless a different understanding affirmatively appears." It will be seen that this covers the present case. However, the contrary view was maintained in the Circuit Court of Appeals for the First Circuit.[5] Again, different weight is to be attached to certain facts, depending upon whether the draft is "sight" or "time" paper. If it is the

[2] Tyson v. Rawls, 77 Md. 412 (1893); Ditch v. Western National Bank of Balto., 79 Md. 192 (1894).

[3] McCleod v. Evans, 66 Wis. 401 (1886); 2 Morse on Banks and Banking, Fourth Edition, sec. 583a.

[4] Security Bank of Minn. v. Northwestern Fuel Co., 58 Minn. 141 (1894); dictum in Craigie v. Hadley, 99 N. Y. 131 (1885), where the general doctrine to this effect is said not to be open to question.

[5] Beal v. City of Somerville, 50 Fed. Rep. 647 (1892).

former, the question of most importance, according to some authorities, is whether the bank can charge back the amount of the draft to the depositor's account, in case, for any reason, it cannot be collected.[6] This is disputed in Maryland[7] and Kansas,[8] where it is said that the right of the bank to charge back is really only a recognition of its rights as indorsee, "and hence is not in any sense inconsistent with ownership." As regards "time" paper, the controlling element seems to be the nature of the entry on the books of the bank. If the full amount of the draft is credited to the depositor, it is held that a sale of the paper has not taken place,[9] but if the proceeds only are credited; *i. e.*, the amount of the draft, less the discount, title has passed to the bank.[10] The mere fact that the depositor may draw on the bank immediately after the deposit of the draft is generally considered not to indicate a transfer of ownership.[11] There seems to be a divergent opinion, however, as to whether the fact that the credit is given as cash has the effect of passing title,[12] there being no element of greater weight—such as an agreement of the parties—to determine the question.

It will thus be seen that the law on this subject is not uniform, although, as has already been said, some of the supposed conflict of authority is due to the fact that in many apparently irreconcilable cases there are seemingly unimportant elements which serve to distinguish and reconcile them. The only general statement which can safely be made as to the whole question is that it is one of fact, depending on the circumstances which exist in each case.

*L. C. A.*

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CARRIERS—DEPOT REGULATIONS—EXCLUSIVE LICENSE TO TUG BOAT COMPANY.—The question of the obligation of a common carrier to afford equal privileges in and about its depots, to persons, not themselves passengers, shippers or consignees, who seek the business of removing the persons or goods carried from the depot, was raised in an interesting way in the recent case of Baker-Whiteley Coal Co. v. B. & O. R. R. Co.[1] The defendant railroad

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[6] Armour Packing Co. v. Davis, 118 N. C. 548 (1896); Zane on Banks and Banking, sec. 133.

[7] Ditch v. Bank, *supra.*

[8] Noble v. Doughten, 72 Kan. 336 (1905). *Accord:* Trust and Savings Bank v. Mfg. Co., 150 Ill. 336 (1894).

[9] Giles v. Perkins, 9 East, 12 (1807).

[10] Carstairs, *et al.*, v. Bates, 3 Campbell, 301 (1812).

[11] Balbach v. Frelinghuysen, 15 Fed. Rep. 675 (1883). 2 Morse on Banks and Banking, Fourth Edition, sec. 583c.

[12] Kavanaugh v. Bank, 59 Mo. App. 540 (1894), and Amer. Ex. Nat'l Bank of Chicago v. Gregg, 37 Ill. App. 425 (1890), hold that in such a case title has passed. *Contra:* Beal v. City of Somerville, *supra.*

[1] 188 Fed. 405 (1911).

company had established a pier in Curtis Bay, near Baltimore, which was held out and used as an ordinary railway freight station for shipments of coal. It contracted to give the exclusive right of docking vessels at the pier to a tug-boat company, a business rival of the complainant. The complainant had a contract with the owners of the steamship "Horda" to tow her to the pier where she was to load with coal. On attempting to perform the contract the complainant's hawsers were cast off and it was prevented from docking the vessel. The complainant brought a bill praying that the defendant be restrained from enforcing the regulation made necessary by its contract. The Court conceded that the tracks and station of a railroad company continue to be private property although devoted to public use and that they were subject to reasonable regulation by the railroad, but held that the contract in question was void as an attempt, under guise of regulations for the use of the wharf, to limit the right to approach it over the navigable waters of the United States, to a single person.

There is a very interesting line of cases raising this and kindred questions, and it is submitted that an examination of them, while it leads to the conclusion that the decision in the principal case is correct, discloses a slightly different ground on which a more logical *ratio decidendi* of the case might have been pronounced. These cases seem to fall into three general classes.

The first class of case deals with the carrier's right to regulate the use of that part of its private property which is the real essential of its equipment as carrier and over which its statutory monopoly extends, that is, its rails. Here its right is absolute so long as it gives the public uniform and efficient service. "If this is done the railroad owes no duty to the public as to the particular agencies it shall select for that purpose. The public require carriage but the company may choose its own appropriate means of carriage, always provided they are such as secure reasonable promptness and security." [2] So also a carrier owes no duty to handle impartially the sleeping cars of every car company which wishes to serve the public on its trains.[3] Within the limits of its statutory monopoly, a carrier

[2] Express Cases, 117 U. S. 1 (1885). In these cases certain express companies sought to restrain certain railroads from discriminating against them in the matter of the accommodation afforded express companies in general. The bills were dismissed. The result of the case is tersely summed up by Baker, J., in his opinion in Donovan v. Pennsylvania Co., 120 Fed. 215 (1903): "The railroad company is a common carrier of merchandise, but not a common carrier of common carriers of merchandise."

[3] Pullman Cases, 139 U. S. 24 (1890). See the words of Mr. Justice Harlan, at page 89: "Its duty, as carrier of passengers was to make suitable provision for their comfort and safety. Instead of furnishing its own dining room and sleeping cars as it might have done, it employed the plaintiff whose special business it was to provide cars of that character, to supply as many as were necessary to meet the requirements of travel * * * it was a matter of indifference to the public who owned them." See also Barney v. Steam-

can exclude all others who wish to serve its passengers, or give exclusive licenses for such service. It owes no duty of uniform service to such persons.

The second class of case is where the railroad attempts to regulate the use of the public highway adjacent to its stations. It is universally agreed that this cannot be done. "But the right of the railroad company, as abutting owner, and the rights of passengers are not in their nature paramount to the rights of others of the general public, to use the side walk in question, in legitimate ways and for legitimate purposes. Licensed hackmen and cabmen, unless prohibited by valid local regulations, may, within reasonable limits, use a public sidewalk in prosecuting their calling, provided such use is not materially obstructional in its nature."[4] The freedom of those soliciting business from passengers, to use the public highway without regulation by the carrier, was upheld by the Minnesota Supreme Court in Godbout v. Depot Co.[5]

The third class of case presents facts falling between those of the two classes already discussed. The question raised is the right of the carrier to regulate the solicitation of business from passengers by hackmen on the platforms, or within the depot or adjacent private property, of the carrier. All cases agree that the carrier may make reasonable regulations which do not discriminate between parties soliciting such business.[6] As to granting exclusive licenses to hackmen and the like to solicit within the depot, the cases have been in conflict;[7] but the more recent decisions seem to recognize this right in the railroads.[8] It is universally admitted, however, that an exclusive license which is held valid, does not prohibit a private conveyance from entering the depot or grounds to receive the owner

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boat Co., 67 N. Y. 301 (1876); Kates v. Atlanta Baggage Co., 107 Ga. 636 (1899).

[4] Donovan v. Pennsylvania Co., 199 U. S. 279 (1905). The Circuit Court had enjoined the hackmen in this case "from congregating on the sidewalk, in front of, adjacent to, or about, the entrances and there soliciting the custom of passengers." "This injunction," said the Court of Appeals, "was too broad; the congregating that may be restrained in this suit is only such as interferes with the ingress and egress of passengers and employees." This seems to recognize that the only right a railroad has in the abutting highway is the easement common to all owners of abutting property.

[5] 47 L. R. A. 532 (1900).

[6] Cole v. Rowen (Mich., 1891), 13 L. R. A. 848. A regulation assigning a special place to each cabman was upheld. See also: Hutchinson on Carriers' Second Edition, Section 522; I Fetter on Carriers, Section 245.

[7] Donovan v. Pennsylvania Co., 61 L. R. A. 140, and note; Cole v. Rowen, 13 L. R. A. 848 (Mich., 1891) and note; Godbout v. Depot Co. (Minn., 1900); 47 L. R. A. 532, and note; Hutchinson on Carriers, Second Edition, Sections 522, 523; I Fetter on Carriers, Section 245

[8] Donovan v. Pennsylvania Co., 199 U. S. 279 (1905); Oregon Short Line v. Davidson, 33 Utah 370 (1908); Note to last case in 10 L. R. A. (N. S.) 777; Railroad v. Brown, 177 Mass. 65 (1900), affirming Old Colony R. R. v. Toupp, 147 Mass. 35 (1888).

or his goods; and for this purpose a public vehicle previously hired, is considered a private vehicle.[9]

The Court reached its decision in the principal case on the theory that it was dealing with a case of the second class: that the railroad by the regulation in question, sought to restrict the use of adjacent navigable waters of the United States by independent tug-boat owners. The Court assumed that a tug-boat in docking a vessel makes no use of the pier proper, but only of the surrounding waters. "He (complainant) does not ask to be allowed to go upon the pier or other property of the defendant, or make any use of it for the purpose of soliciting business or otherwise, as claimed by the hackmen." It is submitted that this is too nice a distinction in fact, and that the decision could have been reached more rationally by considering the case as one under the exception to the third class of case discussed in relation to private conveyances. The facts showed that the coal was delivered at the pier "to whatever vessel or vessels the shippers or consignee of the same may designate." The steamer "Horda" was the private vessel of the consignee; and in bringing her to the pier, the services of a tug-boat were no less necessary than are those of a driver to a vehicle on land. It is also true that the complainant's contract to dock the steamer was made previous to the docking; and the case was not one of a tug soliciting business at the pier, but of the right to the use of the pier by a tug already in contract with the person whose legal right it was to receive the coal.

*F. L. B.*

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CONSTITUTIONAL LAW—VIOLATION OF THE THIRTEENTH AMENDMENT.—In a recent case in Georgia[1] the question before the court was the constitutionality of those sections of the Penal Code making it a misdemeanor to contract to perform services with intent not to perform them;[2] and making satisfactory proof of the contract and the failure to perform, *prima facie* evidence of an intent to defraud.[3] The court held the first provision constitutional, and refused to discuss the second as it was not before them under the facts of the case. The argument of the court was that it was not the breach of contract that was made a crime, but the intent to defraud, and the actual defrauding of another by virtue of such intent. There is no reason why fraudulent practices should not be made crimes, and if in the course of their punishment, the

[9] Griswold v. Webb, 19 Atl. Rep. 143 (R. I., 1889); Summitt v. State, 8 Lea 413 (Tenn., 1881); I Fetter on Carriers, Section 245; Masterson v. Short, 33 How. Pr. 481 (N. Y., 1867).

[1] Latson v. Wells, 71 S. E. 1052 (Ga., 1911).

[2] Ga. Penal Code, 1910, Sec. 715.

[3] Ga. Penal Code, 1910, Sec. 716.

guilty person is compelled to perform an obligation, this is not involuntary servitude within the meaning of the Thirteenth Amendment.

The question is ably discussed in the leading case of Bailey v. Alabama.[4] The facts in that case differed from those in Latson v. Wells only in that the statutory provisions were all included in one section instead of two separate ones. The act was held unconstitutional. Justice Hughes in his opinion says, in effect, that before the amendment making the refusal to perform *prima facie* evidence of an intent to defraud, the act did not make the mere breach a crime. The intent was the essential ingredient, and this had to be proved. In the case at bar there was no intent to defraud or at least no evidence of it; but the defendant could not testify that he did not intend to injure or defraud. He stood stripped by the statute of the presumption, and exposed to conviction for fraud upon evidence only of contracting and failing to fulfill his obligation. If the service is rendered in liquidation of a debt, there is no punishment. Though the statute in terms is to punish fraud, still its natural effect is to expose to punishment for crime, those who fail or refuse to perform their contracts; and judging its purpose by its effect, it seeks in this way to provide the means of compulsion through which performance of such service may be secured.

Objection to the constitutionality of these statutes was made under the Thirteenth Amendment and the protecting generalities of the words "involuntary servitude." That these words are not confined to African slavery but apply to civil freedom in general, there can be no doubt.[5] In accordance with this interpretation, Congress has legislated against peonage,[6] and this, it is held in Bailey v. Alabama, "necessarily includes all legislation which seeks to compel the service or labor by making it a crime to refuse or fail to perform it." The opinion continues; "if it (the state) cannot punish the servant as a criminal for the mere failure or refusal to serve without paying his debt, it is not permitted to accomplish the same result by enacting a statutory presumption which, upon proof of no other fact, exposes him to conviction and punishment." In view of this language, it is difficult to see how the Georgia court in the principal case, distinguishes their decision on the ground that it was the evidentiary portion of the Alabama statute that influenced the United States Supreme Court, and that there was nothing in that decision that declared the main body of the statute unconstitutional.

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[4] 219 U. S. 219 (1910).

[5] Civil Rights Cases, 109 U. S. 20 (1883); Op. Atty's Gen'l, Vol. 25, 477 (1905). "I have no hesitation in saying that any person held to labor or service against his will, although he may have voluntarily contracted to submit himself to such control is in a condition of involuntary servitude within the meaning of the constitution."

[6] Revised Statutes, Sec. 1990.

No cases other than those mentioned, bring up the point of the refusal to perform being *prima facie* evidence; and only a few have presented the main question. Of these, the trend seems to be that such an act is constitutional.[7] In spite of the opinion in Bailey v. Alabama, we are much impressed with the dissent in that case, of Mr. Justice Holmes. He points out that making a breach of contract a crime is merely a question of the *quantum* of compulsion. Any legal liability has this effect, and the addition of criminal liability to a fine or damages, simply intensifies the legal motive for doing right; it does not create it. To hold otherwise, is saying that the Thirteenth Amendment outlaws contracts for labor. Compulsory work for no private master in a jail is not peonage. If work in a jail is not condemned in itself, without regard to what conduct it punishes, it may be made a consequence of any conduct that the state has power to punish. Moreover no person is required to enter into such a contract unless he chooses to do so; and if he does so, he must take the consequences applied by the law to the violation of a contract into which he has voluntarily entered, just as he subjects himself to any other penalties of the law.[8] There seems no reason why making the actual breach *prima facie* evidence should alter these considerations. The fact is to be merely *prima facie* evidence: it is not conclusive. Standing alone, it does not necessarily determine the guilt of the accused.[9] In most cases of this sort, if the party breaking the contract has good reason for so doing and does not intend to defraud, he is able to prove it, whereas it is usually impossible for the other party to prove fraudulent motive in leaving his employment. A statute providing that one fact shall be *prima facie* evidence of the main fact in issue is not unconstitutional if there is a rational connection between the fact and the ultimate fact presumed.[10] In view of these considerations and the state of the law on the subject it is unfortunate that the Supreme Court of Georgia in Latson v. Wells felt compelled to reconcile their decision with Bailey v. Alabama, instead of openly expressing what their opinion certainly intimates—that these statutes considered separately or together are constitutional.

*C. H. S. Jr.*

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PARTNERSHIP—DISSOLUTION—POWERS OF A PARTNER.—On December 15th, one of two partners retired from the firm and notified the plaintiff bank of this fact, having previously instructed it

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[7] *Ex Parte* Riley, 94 Ala. 82 (1891); State v. Williams, 32 S. C. 123 (1889), but cf. Slaughter-house Cases, 16 Wall. 36 (1872), presenting a decision *contra*, on an analogous statute.

[8] State v. Williams, *supra*, cf. statement in Op. A. G., Vol. 25, 477 (1905).

[9] Bailey v. State, 161 Ala. 78 (1909).

[10] M. J. & K. R. R. v. Turnipseed, 219 U. S. 35 (1910).

not to loan any more money to the partnership. According to the regular method of the partners in conducting their business, December 15th was the day on which they were accustomed to discharge the indebtednesses incurred between November 15th and December 1st. Between December 1st and 15th, the remaining partner had issued a number of firm checks in discharge of firm obligations which would have overdrawn the account had he not gone to the plaintiff bank and made a note for $400 in the firm name. It was held in First National Bank of Antigo, v. Larsen [1] that the retiring partner was liable on this note, there being some evidence of his acquiescence in the liquidation by his co-partner.

The position which the court takes is that the partners were liable on the checks drawn before December 15th, and were liable also on the original indebtedness to the various persons to whom the checks were issued; that the recovery, therefore, was substantially based on the original indebtedness, and the mere fact that it was nominally on the notes should not preclude recovery.

It is well settled by the great weight of authority that after the dissolution of a partnership, one partner cannot bind the other by any new engagements that he may enter into in the firm name,[2] even though he be entrusted with the liquidation of the affairs of the partnership, and although the obligation entered into be for the purpose of discharging an antecedent indebtedness to the firm.[3] This is predicated on the theory that the mutual agency is revoked *ipso facto* by the dissolution, and all obligations subsequently entered into are purely personal. Pennsylvania is the only jurisdiction which substantiates the position taken by the Wisconsin court.[4]

If the bill or note be drawn before the dissolution of the partnership, but is not issued until afterward, liability attaches to the retired partner.[5] But if, on the other hand, a piece of negotiable paper is issued in the firm name before dissolution and, upon falling due after dissolution, is renewed by the liquidating partner in the firm

[1] 132 N. W. Rep. 610 (Wis. 1911).

[2] Abel v. Sutton, 3 Espinasse, 108 (1802); Dolman v. Orchard, 2 C. & P. 104 (1825); Heath v. Sansom, 4 B. & Ad. 172 (1832); *In re* Fraser, 2 Q. B. 633 (1892); Fontaine v. Lee's, Admrs., 6 Ala. 889 (1845); Curry v. White, 51 Cal. 530 (1876); Tombeckbee Bank v. Dumell, 5 Mason, 56 (1828); Bates on Partnership, 694; Burdick on Partnership, 225; Lindley on Partnership, 245; Pollock on Partnership, Part I, Sec. 38; Shumaker on Partnership, 430; Story on Partnership, 322.

[3] Kilgour v. Finlyson, 1 H. Black, 156 (1789); Burr v. Williams, 20 Ark. 171 (1859); Bower v. Douglass, 25 Ga. 714 (1858); Hayden v. Cretcher, 75 Ind. 108 (1881); Bank of Montreal v. Page, 98 Ill. 109 (1881); Montague v. Reakert, 6 Bush. 393 Ky. (1869); Perrin v. Keene, 19 Me. 355 (1855); Hurst v. Berry, 8 Md. 399 (1855); Haddock v. Crocheron, 32 Tex. 276 (1869); Lockwood v. Comstock, 4 McLean, 383 (1848); 3 Kent's Comm. 63, 14th Ed.; 32 Lrans. 255.

[4] Robinson v. Taylor, 4 Pa. 242 (1846); McCowin v. Cubbison, 72 Pa. 358 (1872); Lloyd v. Thomas, 79 Pa. 68 (1875).

[5] Lewis v. Reilly, 1 Q. B. 348 (1841).

name, no liability attaches.[6] It has been said by way of dictum that while firm paper issued after dissolution in payment of pre-existing obligations is not binding on the retired partner, a simple acknowledgement of indebtedness given by the liquidating partner would be binding on the retired partner.[7] The rule that an express authority to use the firm name after dissolution is necessary in order to fasten the liability seems to be favored.[8]

The decision of the Wisconsin court is to be criticised not so much for the adoption of a view which is decidedly in the minority as for the reasoning by which the conclusion is reached. Perhaps the administration of justice requires a slight relaxation of the old pleading rules but it is submitted that the court's action is in effect a disregard of all substantive rights.

*C. A. S.*

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PLEDGE—RIGHT OF THE PLEDGEE TO BECOME A PURCHASER.—The pledgee of securities given as collateral for certain notes upon which the pledgor was bound, bought in, at his own sale, certain stock not covered by the authority given to sell at public or private sale, and to become the purchaser at such sale. Upon suit brought against the pledgor for the balance due on the notes, he filed a cross-bill, alleging that the pledgee bank had no authority to sell and buy in the stock, and charged the bank with being guilty of a conversion. It was held that the bank was not guilty of a conversion as the stock was still in its possession. The Chancellor directed that the stock be sold, that the proceeds of the sale be credited upon the note, and that after such credit, a decree be given against the defendant for the remainder due upon the notes.[1]

The first definition of a pledge was given by Lord Holt, in the case of Coggs v. Bernard:[2] "when goods or chattels are delivered to another as a pawn, to be security to him for money borrowed of him by the bailor." A pledge differs from a lien, which is the mere right to retain possession and which is lost when the possession is surrendered. By the contract of pledge, the pledgor invests the pledgee, not only with the mere right of possession, but with the right to deal with the thing pledged as his own, if the debt is not paid and the thing redeemed at the appointed time. The contract continues in force until the pledge is redeemed or sold.[3]

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[6] Van Valkenburg v. Bradley, 14 Ia. 108 (1862); Palmer v. Dodge, 4 Ohio St. 21 (1854); Parker v. Cousins, 2 Grat. 372 Va. (1845). But see *contra*, Megram v. Abel, 189 Pa. 215 (1899).

[7] Smith v. Shelden, 35 Mich. 42 (1876).

[8] Potter v. Tolbert, 113 Mich. 486 (1897); 32 L. R. A. N. S. 258, and cases there cited.

[1] Holston Nat. Bank v. Wood, 140 S. W. Rep. 31 (1911).

[2] 2 Ld. Raymond, 909, 913 (1702).

[3] Donald v. Suckling, L. R. 1 Q. B. 585 (1866).

It is generally conceded today that, upon default by the pledgor, the pledgee has a choice of any one of the following remedies:[4] (1) He may proceed personally against the pledgor for his debt without selling the collateral security.[5] This remedy does not in any way affect his lien by virtue of the pledge. (2) He may file a bill in chancery and have a judicial sale under a regular decree of foreclosure. The civil and the early common law rule was that a pledge could not be sold without a decree of the court, unless there was an agreement to the contrary. This method is used today in cases where the pledge covers indefinite and unascertained accounts,[6] or where the pledgor cannot be found to be served with notice of the sale.[3] He may sell without judicial process upon giving reasonable notice to the debtor to redeem.[7] If the pledgee resorts to the last method, he is liable for a conversion, if he sells without giving the required notice to the pledgor,[8] or if he sells at a private sale,[9] unless the contract of pledge waives the right to notice or authorizes a private sale. The reason for this rule is that the sale has put it out of the pledgee's power to re-deliver the pledge, upon tender or payment of the debt which it secures.

It is unlawful for the pledgee to directly or indirectly purchase at his own sale,[10] as he stands in a fiduciary relation to the pledge, and like a trustee, he is not permitted to buy in property so committed to his charge. His duty to the pledgor is inconsistent with his interest as a purchaser. His duty to the pledgor is to get the highest price which the property will bring and his interest as a purchaser is to get it as cheaply as possible. However, a purchase by the pledgee does not of itself amount to a conversion, as the pledgee is still in a position to fulfill his contract.[11] Under the contract the pledgee is entitled to retain possession of the pledge until the debt or engagement for which the security was given, is discharged by tender, payment or performance. His obligation is to return the property to the pledgor upon performance of the agreement by him.

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[4] Robinson v. Hurley, 11 Iowa, 410 (1860).

[5] Taylor v. Cheever, 72 Mass. 146 (1856).

[6] Conyngham's Appeal, 57 Pa. 474 (1868).

[7] Stearns v. Marsh, 4 Denio (N. Y.), 227 (1847).

[8] Stevens v. Hurlbut, 31 Conn. 146 (1862); Gay v. Moss, 34 Cal. 125 (1867); Feige v. Burt, 118 Mich. 243 (1898).

[9] Strong v. Nat. Mechanics Bkg. Asso., 45 N. Y. 718 (1871).

[10] Chicago Artesian Well Co. v. Corey, 60 Ill. 73 (1871); Stokes v. Frazier, 72 Ill. 428 (1874); Killian v. Hoffman, 6 Ill. App. Cases, 200 (1880); Md. Fire Ins. Co. v. Dalrymple, 25 Md. 242 (1866); Sharpe v. Nat. Bank of Birmingham, 87 Ala. 644 (1888); Middlesex Bank v. Minot's Admr., 45 Mass. 325 (1842). See also cases under notes 11, 12, 13 14 and 15, *supra*.

[11] Winchester v. Joslyn, 31 Colo. 220 (1903); Appleton v. Turnbull, 84 Me. 72 (1891); Terry v. Birmingham Nat. Bank, 93 Ala. 539 (1890); Bryan v. Baldwin, 52 N. Y. 232 (1873).

The rights of the pledgor, in case of a purchase by the pledgee, are to affirm or disaffirm the sale. It is not void, but voidable. If the pledgor elect to treat the sale as void the pledgee continues to be held under the original agreement, leaving the rights of the parties unaffected. Upon tender of the debt and refusal by the pledgee to return the pledge there is a conversion and the lien is discharged.[12] If the pledgor affirms the sale, he may hold the pledgee liable for the amount bid by him at the sale, and the pledgee cannot recover the full amount of the debt from the pledgor, but will be forced to allow the proceeds of the sale to be set off against his claim.[13] The right to avoid the sale, in case the pledge is afterwards sold to a purchaser for value, is lost if not exercised within a reasonable time,[14] and even though there be no subsequent sale, if the pledgor does not disaffirm the sale by a tender, within a reasonable time after he has knowledge that the pledgee was the purchaser, he is taken to have affirmed it.[15]

The principles governing the decree of the chancellor in the case of Holston National Bank v. Wood are, therefore, sound in reason and in accordance with the previous decisions upon the question.[16]

*R. B. W.*

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PROPERTY—ADVERSE POSSESSION—RAILROAD RIGHT OF WAY.—The D. L. & W. R. R. Co. acquired, by deed of purchase, a strip of land outside of, but adjoining, its right of way. For more than fifty years the company did absolutely nothing to indicate that it had any purpose whatever in acquiring the property. In an action of ejectment, the defendant proved adverse possession of the premises for longer than the statutory period. The plaintiff company contended that the property was purchased with a view of making it part of the right of way, and that, consequently, title to it could not be acquired by adverse user. *Held,* that although no part of the right of way of a railroad company can be acquired by adverse possession, there is no authority for holding that property of a railroad company not included in its right of way, may not be so acquired. Nothing is included in the right of way except that which may lawfully be the subject of condemnation, and when a railroad company asserts a public use in land it has purchased, to overcome

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[12] Hyams v. Bamberger, 10 Utah 1 (1894).

[13] Faulkner v. Hill, 104 Mass. 188 (1870).

[14] Lord v. Hartford, 175 Mass. 320 (1900); Hayward v. Nat. Bank, 96 U. S. 611 (1877).

[15] Hill v. Finigan, 77 Cal. 267 (1888); First Nat. Bank of Kansas City v. Rusk, 85 Fed. 539; McDowell v. Chicago Steel Works, 124 Ill. 491 (1889); Geer v. Lafayette Co. Bank, 128 Mo. 559 (1895).

[16] For a general note on the subject of pledges, see note to the case of Glidden v. Mechanics' Bank, 53 Ohio, 588 (1895), in 43 L. R. A. 737.

the adverse possession by another, its claim can only be sustained by showing the existence of conditions which would have permitted it to condemn land in the first instance, or actual dedication to such use.[1]

The theory of this case is based on the Constitution of Pennsylvania [2] and is, that land which forms the railroad's right of way is impressed with a public use,[3] and is to be considered as a public highway; consequently title to it cannot be acquired by adverse user. Since, in order to acquire land by condemnation proceedings, it is necessary to prove a public use,[4] title to it is said to be unable to be lost by the adverse user of another. But, in regard to land *purchased* by a railroad company, the statute of limitations is applicable unless the owner can prove that it is being devoted to a public use.[5]

The United States Supreme Court has reached the same conclusion by a different line of reasoning. In the case of N. Pac. R. R. v. Townsend,[6] Congress had granted to a railroad company for a right of way, land which a third party subsequently claimed to have acquired by adverse use. White, J., said: "That in effect the grant was of a limited fee, made on an implified condition of reverter in the event that the company ceased to use or retain the land for the purpose for which it was granted. * * * To give such efficiency to the statute as would confer a title on the defendant would be to allow that to be done by indirection which could not be done directly."

Other cases deny the theory and conclusion of the principal case. "A railroad company owes certain duties to the public, but it holds and uses its property for the profit of its stockholders. The cases holding that the statute of limitations affords no defence to actions for encroachment upon streets and roads are inapplicable. A railroad is not a public highway in the sense that it belongs to the people. . . . The state confers the power of eminent domain to enable railway companies to perform efficiently their duties as common carriers. But it is not apparent why the state should be concerned in preventing investors in railway stocks from sustaining loss through the negligence of their agents (directors)." [7] The logic of this case is clear and unanswerable: if a railroad right of way has been held adversely for twenty-one years, not only was there no public use for it, but the interests of

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[1] D. L. & W. R. R. Co. v. Tobyhana Co., 81 Atl. 132 (Pa., 1911).

[2] Art. 17: "All railroads and canals shall be public highways," etc.

[3] Reading Co. v. Seip, 30 Pa., Super. 330 (1906).

[4] P. & L. Dig. of Dec., Vol. 5, Col. 8044.

[5] Lehigh V. R. R. v. Frank, 39 Pa. Super. Ct. 624 (1909). *Accord:* So. Pac. R. R. v. Hyatt, 132 Cal. 240 (1901); Rwy. Co. v. Smith, 170 Mo. 327 (1902); R. R. Co. v. McCaskill, 94 N. C. 746 (1886).

[6] 190 U. S. 267 (1902).

[7] Pgh., etc., Rwy. Co. v. Stickley, 155 Ind. 312 (1900).

the public have not in the least been affected. This reasoning would not apply to streets. When the occasion arises that the land is needed as part of the right of way, it can then be acquired by purchase or condemnation proceedings. The public is not damnified by such a rule. "The possession by a railroad company of its road-bed is the possession by a corporation as its private property to enable it to perform a public duty," [8] and, it is submitted,[9] not differing from the possession of property by any other public service corporation. The courts of Illinois [9] and Mississippi [10] have adopted this view. Other jurisdictions, notably Massachusetts,[11] have seen fit to alter it by statute.

*M. G.*

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[8] Spottiswoode v. R. R. Co., 61 N. J. L. 322 (1898).
[9] Donahue v. R. R. Co., 165 Ill. 640 (1897).
[10] Paxton v. R. R. Co., 76 Miss. 536 (1898).
[11] St. of 1861, c. 100.