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NOTES.

BANKS AND BANKING—STOCKHOLDERS' LIABILITY—ENFORCEMENT AGAINST THE REPRESENTATIVES OF A STOCKHOLDER AFTER DEATH—In a recent federal decision the executors of a stockholder of a national bank were held liable *de bonis propriis* for the statutory liability adhering to the ownership of the stock. The testator had died in 1890; one month later the bank failed. In 1892 the executors paid all the debts proved or then provable under the laws of the State and distributed the residue of the estate in accordance with the terms of the will, without taking refunding bonds, and filed their final account in the probate court of Delaware. The report of the case does not state whether this account was confirmed or not. The stock was never transferred from the name of the testator on the books of the bank. In 1900 the Comptroller made an assessment against the stockholders of the bank. In a suit against the executors and legatees begun in 1902, it was held that,

under Section 5152 of the Revised Statutes, the statutory liability for these assessments attached, by virtue of the insolvency of the bank, even though in fact unknown to the executors, to the estate of the decedent as a charge or lien in favor of the creditors of the bank; that distribution of the estate without discharging such charge or lien was a breach of trust or *devastavit;* that Section 5152, though providing that the decedent's estate and not the executor personally should be liable for the assessment, did not declare that an executor should not be personally liable as a wrongdoer for breach of trust; and that recovery could not be had against the legatees.[1]

This case seems to be an undue extension of the trust fund theory of *Wood* v. *Dummer,*[2] and holds, in effect, that not only the assets of an insolvent corporation but also the private assets of a stockholder of a national bank to the extent of again the par value of his stock, are a trust fund for the payment of the debts of the bank. Yet the obligation or liability, whether held to be contractual or statutory,[3] does not become a debt until an assessment has been made on the stock by the Comptroller of the Currency;[4] after the failure of the bank and up to the time the assessment is payable the liability, while perhaps more than contingent, is not yet fixed[5] and can properly be said to be potential only. Until the assessment is payable no right of action exists upon this liability;[6] nor is the statute of limitations a bar thereto.[7] Now in the case of the death of a stockholder, title to his stock vests in his estate or more properly in his legal representative.[8] The latter, however, is owner in a representative capacity only; and, in the absence of any question of *devastavit,* under Section 5152 of the National Banking Act the liability as owner of the stock attaches to the estate and not to the

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[1] Rankin v. Miller, 207 Fed. Rep. 602 (U. S. Dist. Ct., Dist. Del., 1913).

[2] 3 Mason, 308 (U. S. C. C., Dist. Me., 1824).

[3] In King v. Armstrong, 9 Cal. App. 368 (1908), the liability is held to be "created by law"; in Matteson v. Dent, 176 U. S. 521 (1899), Deweese v. Smith, 106 Fed. Rep. 438 (1901), Christopher v. Nowell, 201 U. S. 216, 225, and Rankin v. Ware, 88 Kan. 23 (1912), it is held to be contractual; in McDonald v. Thompson, 184 U. S. 71, 74 (1901), it is held to be both statutory and contractual. See 18 H. L. R. 620; 25 *Ibid.* 189.

[4] McDonald v. Thompson, 184 U. S. 71 (1901).

[5] Rankin v. Ware, 88 Kan. 23 (1912); Whitaker v. Kershaw, 45 Ch. Div. 320 (Eng. 1890).

[6] Rankin v. Barton, 199 U. S. 228 (1905); Aldrich v. Skinner, 98 Fed. Rep. (1899) 375; Aldrich v. McClaire, 98 Fed. Rep. 378 (1899); Davis v. Weed, 44 Conn. 569 (1878).

[7] McClaire v. Rankin, 197 U. S. 154 (1905); the statute of limitations of the State within which the action is brought applies.

[8] Parker v. Robinson, 71 Fed. Rep. 256 (C. C. A., 1st Cir., 1895); Zimmerman v. Carpenter, 84 Fed. Rep. 747 (1898); Davis v. Weed, 44 Conn. 569 (1878).

personal representative.[9] It is well established that the debts of the decedent are a lien in equity upon all the personal property of the decedent's estate.[10] But such lien exists only in favor of claims or demands which are due and payable or then due and payable at a certain future time.[11] It is difficult, therefore, to see how a stockholder's potential liability, before being fixed and declared due by the Comptroller, can be held to be a "charge or lien" upon the estate of the decedent in the hands of the executor. To hold so it is to regard the receiver of the insolvent bank not only as a creditor, but also as a preferred creditor, before he has even a right of action. Such a result, it is submitted, was not contemplated by the National Banking Act in Section 5151.

The distribution of the estates of decedents is a matter within the peculiar jurisdiction of the State courts.[12] What amounts to a breach of the executor's trust should therefore be a question for the exclusive determination of the State courts, depending, as it often does, upon the procedural statutes applicable to matters of probate in the particular State.[13] Further, a federal court which has taken jurisdiction upon the ground of diversity of citizenship must administer the law of the State in which it sits and is bound by the Act of 1804[14] to give such faith and credit to the records and judicial proceedings of any State, when proved in the manner specified in the act, as they have by law or usage in the courts of the State from which they are taken.[15] A federal court so sitting is also bound to recognize the State statutes which are applicable.[16] So it seems necessarily to follow that, if an executor administers the estate in the manner required by the law and usage of his State

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[9] Parker v. Robinson, *supra;* Tourtelot v. Finke, 87 Fed. Rep. 840 (1898); Blackmore v. Woodward, 71 Fed. Rep. 321 (C. C. A., 6th Cir., 1895).

[10] Davis v. Vansands, 45 Conn. 600 (1879); Williams on Executors (10th Ed.), 1315.

[11] In Dear v. Allen, 20 Beavan, 1 (Eng. 1855), the Master of the Rolls refused to permit the executors to withhold a portion of their testator's estate or to make other provision to meet a contingent liability upon certain covenants entered into by the testator; in Wentworth v. Chevill, 26 L. J. (Ch.) 760 (1857), the Vice-Chancellor refused to make provision for the contingent liability of the estate for future calls that might be made upon shares held by testator.

[12] Clark v. Guy, 114 Fed. Rep. 783 (1902); Byers v. McAuley, 149 U. S. 608 (1892); but *cf.* Newberry v. Wilkinson, 199 Fed. Rep. 673 (C. C. A., 9th Cir., 1912), where probate jurisdiction was assumed on ground of diverse citizenship.

[13] *Cf.* Robins' Estate, 180 Pa. 630 (1897); Piper's Estate, 208 Pa. 636 (1904).

[14] Rev. St. U. S., §905.

[15] Kansas City, Ft. S. & M. R. Co. v. Morgan, 76 Fed. Rep. 429 (C. C. A. 6th Cir., 1896); Pennoyer v. Neff, 95 U. S. 714 (1877); *In re* Benwood Brewing Co., 202 Fed. Rep. 326 (1913).

[16] Maiorano v. B. & O. R. R. Co., 213 U. S. 268 (1909).

and cannot be charged with *devastavit* in the courts of that State, the validity of his acts as administrator should not be open to collateral attack in a federal court. In our principal case, however, it does not appear whether the executors were guilty of a *devastavit* under the laws of Delaware or not. An executor is discharged only by order of court, and not *ipso facto* by complete administration of the estate.[17] So in absence of such discharge he may be sued at any time within the statutory period for the debts and obligations of his testator. But if he has not been guilty of a *devastavit* in distributing the assets, judgment may be obtained against him only *de bonis testatoriis,* even though execution thereon, as the estate has been extinguished, is bound to be returned *nulla bona.*[18]

P. N. S.

CONTRACT—EMPLOYMENT FOR LIFE—PUBLIC POLICY—By the weight of authority, an officer, director, or agent for a corporation has no implied power to make contracts of employment for life on behalf of its company.[1] But where such contracts are ratified by the board of directors and are supported by a sufficient consideration they will be enforced. So in *Cox* v. *B. & O. S. W. R. Co.,*[2] where the president of the company agreed to employ an injured workman for life, if he proved competent, in return for forbearance to sue, and the contract was ratified by the directors in making a payment to the employee under the contract, it was held good.

These contracts which by their terms contemplate a continuance of the relation of master and servant for the life of the servant have

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[17] Davis v. Weed, 44 Conn. 569 (1878).

[18] Piper's Estate, 208 Pa. 636 (1904).

[1] In Brighton v. L. S. & M. S. R. Co., 103 Mich. 420 (1894), it was held that it was proper for the court below to allow jury to find that two division superintendents, who represented their company on the settlement of a claim for personal injuries, had authority to make such a contract; but in Maxson v. Michigan Central R. Co., 117 Mich. 218 (1898), it was held that a division superintendent had no such implied power, distinguishing the preceding case on the ground that the company ratified the contract by paying a sum of money to the employee. *Accord,* Nephew v. Michigan Central R. Co., 128 Mich. 599 (1901); Laird v. Michigan Lubr. Co., 153 Mich. 52 (1908); Beers v. N. Y. L. Ins. Co., 20 N. Y. S. 788 (1892), nor have trustees, holding office for four years, such power; Carney v. N. Y. L. Ins. Co., 162 N. Y. 453 (1900), president and actuary holding office for four years have no power to make a contract of employment for life; but in Usher v. N. Y. C. & H. R. R. Co., 76 App. Div. 422 (1902), affirmed in 179 N. Y. 544 (1904), a contract of employment for life was held good, since the company had retained the release and thereby accepted the benefit of the contract.

[2] 103 N. E. Rep. 337 (Ind. 1913). Contract provided that "we will in addition give you employment on this road, it making no difference who may own it, as long as you live and prove a competent and worthy man, and, if at any time you are thrown out of employment, you will receive your salary

been assailed on several distinct grounds,[3] including that of public policy, but none of these objections have prevailed in common law jurisdictions. By public policy is meant that principle of the law which holds that no one can lawfully do that which has a tendency to be injurious to the public or against the public good, which may be termed the policy of the law, or policy in relation to the administration of the law.[4] And it follows that an agreement inimical to the public interests will not be enforced even though it might result beneficially to the party who made and violated it.[5] Therefore a contract compelling a railroad to permit an employee to work under circumstances which might prove detrimental to the public would be void as against public policy on the ground that the company, being *quasi* public servant, could not tie its hands by such an agreement.[6] But in the principal case the alleged employment was to run so long as the injured employee should "live and prove a competent and worthy man," and in case of discharge he should receive his salary thereafter during life, unless "discharged for neglect of duty or dissipation." The company is therefore not required by the contract to violate its duty to the public, but on the contrary the conditions imposed therein sufficiently protect the public interests, and vest the power in the company to discontinue the service whenever, in its judgment, he should become "incompetent and unworthy," and, if discharged for neglect of duty or dissipation, his salary should cease. Since the public interests were so amply protected and there was an adequate consideration for the agreement, it was rightly enforced as a valid contract, and this conclusion is in accord with the great weight of authority in this country.[7] And for the

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as long as you live thereafter, unless your discharge is for neglect of duty or dissipation."

[3] They are not (1) within the statutes of frauds, since capable of complete performance within a year. Pennsylvania Company v. Dolan, 6 Ind. App. 109 (1892); Boggs v. Pacific Steam Laundry Co., 86 Mo. App. 616 (1901); East Line & R. River R. Co. v. Scott, 72 Tex. 70 (1888); (2) void for lack of consideration, as an agreement by the servant to release the employer from liability for damages is a sufficient consideration to support a promise to furnish employment. Pennsylvania Company v. Dolan, *supra;* Hobbs v. Brush Electric Light Company, 75 Mich. 550 (1889); Sax v. Detroit, G. H. & M. R. Co., 125 Mich. 252 (1900); (3) wanting in mutuality, since the servant's option of putting an end to the contractual relation at any moment is supported by an independent consideration. 1 Labatt, Master & Servant (2nd Ed.), §§89, 91; Stearns v. L. S. & M. S. R. Co., 112 Mich. 651 (1897); Rhodes v. Chesapeake, *etc.*, R. Co., 87 W. Va. 826 (1901); (4) *ultra vires.* Bedford, *etc.*, Co. v. McDonald, 17 Ind. App. 492 (1896).

[4] Greenhood, Public Policy in the Law of Contracts, page 2; Egerton v. Brownlow, 4 H. L. Cas. 1 (Eng. 1853).

[5] Metzger v. Cleveland, 3 Ind. L. Mag. 42 (1883); W. Va. Trans. Co. v. Ohio R. P. L. Co., 22 W. Va. 600 (1883).

[6] *Dicta* in Pennsylvania Company v. Dolan, *supra,* note 3.

[7] Pennsylvania Company v. Dolan, *supra,* note 3; Jessup v. C. & N. W. R. Co., 82 Iowa, 243 (1891); Smith v. St. Paul & D. R. Co., 60 Minn.

same reasons a contract of employment as long as the employee does faithful work has been held valid.[8]

Nor is an agreement by which one person obtains permanent employment from another deemed to be against public policy, merely because it has the effect of restraining the servant from engaging in business as long as he continues in the employment.[9] And it has been held that an agreement by which one person agrees to serve another for the term of his natural life, in the same occupation, is not invalid as being in restraint of trade, such a contract merely limiting the servant's action in respect to the manner of following the occupation.[10] But such contract must be by deed.[11] It is, however, submitted that this proposition, though based on high authority, must at the present day be regarded as open to question,[12] since in substance such a situation amounts to slavery, which is illegal.

W. G. S.

DOWER—DIVORCE—CONVEYANCE IN FRAUD OF DOWER OR ALIMONY—The courts of equity will protect a spouse against a voluntary conveyance by the other which will result at law in the exclusion of marital rights, if made pending an engagement of marriage, without the other's knowledge prior to the marriage, even in the absence of express misrepresentation or deceit, and whether the one attempted to be deprived had knowledge of the existence of the property or not. "The concealment of what it is the right of the

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330 (1895); Usher v. N. Y. C. & H. R. R. Co., *supra,* note 1; Pierce v. Tenn., *etc.,* R. Co., 173 U. S. 1 (1898); but see St. Louis, I. M. & S. R. Co. v. Mathews, 64 Ark. 398 (1897), in which it was held that an agreement between employer and employee that the latter should not be discharged without cause, there being no agreement on the part of the employee to serve for any specified time, was not enforceable on the ground that the agreement of both parties is necessary to fix the duration of a contract of service.

[8] L. & N. R. Co. v. Offutt, 99 Ky. 427 (1896).

[9] Carnig v. Carr, 167 Mass. 544 (1897).

[10] MacDonell, Master & Servant (2nd Ed.), page 29; Wald's Pollock on Contracts (3rd Ed.), page 481; Wallis v. Day, 2 M. & W. 273 (Eng. 1837); see Carnig v. Carr, *supra,* note 9. Under the Civil Codes of France and Quebec a contract to serve for an unlimited period is invalid. French Civil Code, Art. 1780; Quebec Civil Code, Art. 1667. In some jurisdictions the length of the term for which a servant may lawfully engage himself has been specifically fixed by the legislature. British Columbia Rev. Stat. (1897), chap. 121 (Master and Servant Act), §2; California Civil Code, 1980; Louisiana Civil Code, Arts. 167, 168 (160, 161); Manitoba Rev. Stat. (1902, Masters and Servants Act); Ontario Rev. Stat. (1897), chap. 157 (Master and Servant Act), §2.

[11] Viner's Abridgment, 323, Master & Servant, n. (5).

[12] Davies v. Davies, 58 L. T. 209 (Eng. 1888).

one to know and the duty of the other to disclose, is itself a fraud in law."[1] The American jurisdictions have adopted this rule, practically without exception, in declaring that such conveyances are void as to the husband's rights in the wife's property, and as to the wife's right to dower, either inchoate or presently accrued by survival.[2] England, however, restricted the application of the rule to such conveyances made by the wife,[3] refusing the reciprocal right to the wife upon the ground that a woman's marriage operated as a gift to her husband of all the property, not settled to her separate use, of which she was then possessed; but that she acquired no rights in his property, as such, except the inchoate right to dower in the property of which he was actually seised during the coverture.[4]

That declarations for the protection of dower rights, inchoate or present, is the full extent to which the courts will go in declaring this class of voluntary conveyances to be void is laid down in *Deke* v. *Huenkemeier*,[5] where the complainant asked that a deed of certain realty executed just prior to the marriage, and without the knowledge of the fiancee, by the husband, without consideration, to a daughter by a former marriage, be set aside upon the grounds of (1) fraud upon her inchoate right of dower, and (2) that, in the event of her husband abandoning her she would become entitled to separate maintenance, or divorce with alimony, in either of which instances she would suffer injury to her "marital rights" in that his estate, which would form the basis of computing the amount then due her, and to which it would attach, is diminished. After

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[1] Chandler v. Hollingsworth, 3 Del. Ch. 99 (1867).

[2] Cameron on Dower, 266, 267; 2 Bishop on Married Women, 353; Petty v. Petty, 43 Ky. (4 B. Mon.) 215 (1843); Swaine v. Perine, 5 Johns. Ch. 482 (N. Y. 1821); Cranson v. Cranson, 4 Mich. 230 (1856); Smith v. Smith, 2 Halst. Ch. 515 (N. J. 1847).

South Carolina stands almost alone in declaring such deeds absolutely void and decreeing reconveyances, Brooks v. McMeekin, 37 S. C. 285 (1892); while the majority view is represented by the ruling of the Kentucky courts, as laid down in Petty v. Petty, *supra*, "To decree that the deeds be annulled entirely, would be to carry the relief beyond any possible legal interest or claim that the wife has or may ever have: . . . a useless act, by which she might never be benefited, as she might die first."

[3] Park on Dower, 236; Strathmore v. Bowes, 1 Ves. Jr. 22 (Eng. 1789); Swannock v. Lyford, Co. Lit. 208 a. n. 1; Banks v. Sutton, 2 P. Wms. 700 (Eng. 1732); nor was it confined to instances of where the husband knew of the property, Goddard v. Snow, 1 Russ. 485 (Eng. 1826).

[4] Lush, Husband and Wife, 89; Strathmore v. Bowes, *supra*. However, earlier writers refer to the wife as having the right to the protection of equity in such cases, Gilbert, Lex Pret. 267. But the later writers and cases have shown the settled rule to the contrary, so decidedly contrary in fact that in Banks v. Sutton, *supra*, we find the court saying "And if this (defeating of dower) were the express purpose, it is an additional reason for allowing it to have that effect."

[5] 102 N. E. Rep. 1059 (Ill. 1913).

ruling that the deed was void as to her inchoate right of dower the court said: "Even if the appellant's contentions were susfained and the deed should be set aside and the title reinvested in her husband, we do not see how it could be kept in him without enjoining him from future transfers of it" in order to protect her rights to alimony, separate maintenance, and the like. "It would be absurd to ask a court of equity, at the suit of a wife, to enjoin her husband from mortgaging or selling his real estate, on the ground that the wife might in some possible contingency want to file a bill for separate maintenance and for alimony against him and that the land would be required to satisfy the decree."

While the authorities expressly in point are few,[6] yet they agree with the principal case upon the ground that dower is a vested, though inchoate right arising immediately upon the marriage, and in the main not to be precluded except by her act or with her consent; whereas the rights to alimony or separate maintenance are highly contingent and problematic, dependent first upon a violation of the marital relations by the husband, and finally upon obtaining a judicial decree allowing the same, and to defeat which many things may arise.

However, where those rights are no longer contingent but have been ascertained before the bringing of the bill to set aside such voluntary conveyances in fraud of marital rights, equity in granting the bill will also provide for the protection of them in addition to dower.[7]

J. C. A.

EMPLOYERS' LIABILITY ACT—WHEN SUIT MUST BE BROUGHT —An employer's liability has always been a fruitful source of discussion and has been productive of a vast amount of legislation, judicial as well as otherwise. The North Carolina courts have added a new twist to the federal Employers' Liability Act[1] by their interpretation of the section[2] limiting the time within which an action must be brought. In *Burnett* v. *Atlantic Coast Line R. Co.*[3] the court held that though this section of the act says, "that no action shall be maintained under this act unless commenced within two years from the day the cause of action accrued," nevertheless since the law "confers no new right and is operative only to with-

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[6] American cases cited in the notes above.

[7] Decree for separate maintenance granted, Fahey v. Fahey, 43 Colo. 354 (1908); and decree of divorce and alimony already granted, Goff v. Goff, 60 W. Va. 9 (1906).

[1] Act April 22, 1908, c. 149, 35 Stat. 65. [U. S. Comp. St. Supp. 1911, p. 1322.]

[2] §6.

[3] 79 S. E. Rep. 414 (N. C. 1913).

draw from the company a defense theretofore existing," the clause was merely one of limitation and therefore unless specially pleaded would not be a bar to the action. Aside from the question as to whether the act does confer any new right or not which is, to say the least a doubtful question, the decision would seem to be an extreme one.

The case admits, what is practically universal law, that where a new right not known to the common law is created by a statute, a clause limiting the time of enforcing the right is a condition precedent to its enforcement—*i. e.,* the right ceases with the expiration of that period.[4] And the court then argues that since no new right is created, the cases laying down this rule do not apply. These decisions do not say, however, that the creation of a new *right* is the only reason for their holding, but merely that it is a sufficient reason. And if we consider the basic and underlying principle it will be found to be as equally applicable to the principal case as the others, for though Congress in passing the act may not have conferred any new *right,* they have at least created certain privileges or benefits, otherwise no one would sue under the act but would merely stand on their common law rights. And that they have created something is admitted by the case which says that the act "was designed to make it easier for employees to recover damages caused by negligence." It is then ridiculous to say that a legislature which could create a new right and limit it to a certain period, could not limit this lesser benefit or privilege, and that one seeking to take advantage of the benefit would not be bound by the limitation. This is practically the view taken by the Scottish courts, who in enforcing their Employers' Liability Act hold that the limitation is for the protection of the defendants just as the operative part of the act is for the protection of the plaintiffs and should be enforced just as strictly.[5]

The principal case, in the opinion cites *Upton* v. *McLaughlin,*[6] in which the following statute[7] was held to be a statute of limitation: "No suit in law or equity shall be maintainable in any court, between an assignee in bankruptcy and a person claiming an adverse interest, touching any property or rights of property transferable or vested in such assignee unless brought within two years from

[4] The Harrisburg, 119 U. S. 199 (1886); Stern v. La Compagnie G. T., 110 Fed. Rep. 996 (1901); Radezky v. Sargent & Co., 77 Conn. 110 (1904); Elliot v. Canal Co., 25 Ind. App. 592 (1900); Rodman v. Ry Co., 65 Kan. 645 (1902); McRae v. N. Y., N. H. & H. R. R., 199 Mass. 418 (1908); Neganbauer v. Great Northern Ry. Co., 92 Minn. 184 (1904); Hill v. Supervisors, 119 N. Y. 344 (1890); Best v. Kinston, 106 N. C. 205 (1890); Martin v. Pittsburgh Ry. Co., 227 Pa. 19 (1910); Lambert v. Ensign Mfg. Co., 42 W. Va. 813 (1896). *Contra,* Kaiser v. Kaiser, 16 Hun. 602 (N. Y. 1879).

[5] Johnston v. Shaw, 21 Sc. L. R. 246 (Scotland, 1883).

[6] 105 U. S. 640 (1881).

[7] Revised Statutes of United States, §5057.

the time when the cause of action accrued for or against such assignee." This case would seem to be an authority for the decision of the principal case, but upon investigation it will be found to have been based wholly upon *Bailey* v. *Glover*,[8] which merely held that fraud until discovered, would prevent the operation of a similar statute, and the court expressly stated that they did not consider the statute of limitations as a part of the bankruptcy act. Under this view the limiting statute could not be a condition precedent unless specifically stated to be such, consequently the case could not be deemed a precedent for the principal case.

T. S. P.

FALSE IMPRISONMENT—IS THE REFUSAL TO AID THE EQUIVALENT OF DETENTION?—A very interesting question in the law of false imprisonment arose in a recent case decided by the Court of Appeal of England.[1] The plaintiff, a coal miner, went down on a shift at about 9.30 in the morning for the purpose of working for the defendants, his employers. The shift was for a period of seven hours. When he had reached the bottom of the mine he was ordered by his employers to do certain work, and he wrongfully refused to do it. He requested to be taken to the surface again; but by the order of his employers, he was not allowed to use the shaft elevator (which was the only means of reaching the surface) until 1.30 o'clock. He brought an action for damages for false imprisonment in respect of his detention. Lord Justices Buckley and Hamilton held that the fact that the defendant did not grant the plaintiff the facility for coming up to the surface did not constitute a false imprisonment. Hamilton, L. J., said that he would not go into the question of whether it was or was not an implied term of the contract that the employers should furnish the means of getting to the surface at any time, for even if there was such term, the remedy for non-compliance would be an action for breach of contract, and it could not, merely because the plaintiff was detained, be construed into the commission of a tort. Lord Justice Vaughan Williams, dissenting, thought there was an unlawful imprisonment.

It is obvious that there is room for difference of opinion upon the question; but to the mind of the writer the dissenting opinion is the more reasonable view.

One may refer to the definition of Thorpe, C. J., in Year Book of Assizes,[2] that a person is said to be imprisoned "in any case where he is arrested by force and against his will, although it be on the high street or elsewhere, and not in a house"; or to Sir Wm. Black-

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[8] 21 Wall. 342 (U. S. 1874).

[1] Herd v. Weardale Steel Co., Ltd., *et al.*, 109 L. T. 457 (Eng. 1913).

[2] Fol. 104, plac. 85 (1348).

stone's definition that "every confinement of the person is an imprisonment"; but such definitions, couched in general terms, are of little aid in determining a delicate question like the one before us. It seems to be agreed that "the wrong may be committed by words alone or by acts alone, or by both, and by merely operating on the will of the individual or by personal violence, or by both."[3] Furthermore, as held in the leading English case of *Bird* v. *Jones*,[4] *per* Coleridge, J., imprisonment is something more than mere loss of freedom or ability to go wheresoever one pleases; it includes the action of restraint within limits defined by a wall or an exterior barrier.

Was there a restraint in the case before us? Lord Justice Buckley answers the question in the negative; for, says he,[5] the defendants must have compelled the plaintiff against his will to stay in that place, and that is not true in this case: "It is quite true that he could not leave the place, but he was detained in that place, not by any act of his master, but by a certain physical difficulty arising from the structure of the place. What kept him from the surface was not any act which his master did. The master says: 'I am not preventing you from getting out; get out by all means, if you can. But you cannot call on me to take you out.' One man imprisons another if he prevents him from leaving; but he does not imprison him merely because he does not assist him to come out." This reasoning is on its face over-technical; the learned Lord Justice himself admits that he reaches a technical result. It is a mere flippancy of words to say to a man: "Get out if you can," when he himself controls the sole means of getting out. The law treats of actualities, and not of abstract technicalities. Lord Justice Vaughan Williams takes the practical and sensible view: "The case to my mind does not differ a jot from the case where there is a staircase instead of a lift, and the manager has the key of the gate in his pocket, but being asked to open the gate which gives access to the stairs chooses to refuse to produce the key, and thus of his own will prevents the man from using the staircase for no other reason whatsoever than of his own will."

Lord Justice Buckley seems to have been swayed by the idea that it was not the employer's duty under the contract to furnish the plaintiff the means of getting to the surface until the seven hours had expired. This seems, however, to be confusing the contractual relation and the social relation of the plaintiff and his employers. If the plaintiff has broken his contract by quitting work before the seven-hour period, he has subjected himself to liability in damages for breach of contract. But plaintiff has not given up his liberty for

[3] Garnier v. Squiers, 62 Kan. 321 (1900).
[4] 15 L. J. Q. B. 82 (Eng. 1845).
[5] 109 L. T. at page 462.

a period of seven hours, and when he quit work, he had a right to be given his freedom and could not be lawfully detained.

In a recent case in Maine,[6] on very analogous facts, the court decided, as Lord Justice Vaughan Williams did in the case under consideration. There, the defendant had taken the plaintiff out on a yacht, having promised to take her ashore whenever she desired; but though the plaintiff several times requested the defendant to take her ashore or to furnish her with a boat, the defendant refused so to do. The court held that there was an unlawful detention; and this though the suit was not based upon the defendant's failure to keep his agreement to take the plaintiff ashore, but an action in tort for false imprisonment.

Y. L. S.

PROPERTY—RIGHTS OF UPPER AND LOWER RIPARIAN PROPRIETORS—DIVERSION OF WATER—For the first time in Massachusetts, the precise point whether riparian rights include diversion in reasonable quantities for a proper use on property outside the watershed has been passed upon by the Supreme Court. In an action by a lower riparian owner on a small stream against an upper riparian owner who by means of a pumping apparatus diverted large quantities of water to another estate belonging to it, but not contiguous to the land adjacent to the stream, and also located in a different watershed, it was held that the only question is whether there is actual injury to the lower estate for any present or future reasonable use. The diversion alone without evidence of such damage does not warrant a recovery even of nominal damages.[1]

It has been said that the rights of riparian ownership extend only to use upon and in connection with an estate which adjoins the stream and cannot be stretched to include uses reasonable in themselves, but upon and in connection with non-riparian estates.[2] A riparian proprietor is one whose land is bounded by a natural stream, or through whose land it flows, and riparian rights are those which he has to the use of the water of such stream, and grow out of and depend upon the ownership of such land.[3] A difficulty then arises in determining when part of an entire tract of land owned by one person ceases to be riparian. There does not seem to be any rule regulating such a question, and for this reason it seems best not to confine the use to riparian lands and to exclude non-riparian.

In the main, it is true, the use by a riparian owner by virtue of his right as such should be within the watershed of the stream, or

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[6] Whittaker v. Sandford, 85 Atl. Rep. 399 (Me. 1912).

[7] Stratton v. Mt. Hermon Boys' School, 103 N. E. Rep. 87 (Mass. 1913).

[2] Lord Cairns in Swindon Water Works Co. v. Wilt and Berks Canal Navigation Co., L. R. 7 H. L. 697, 704, 705 (Eng. 1875).

[3] Gould, Waters (3rd Ed.), §148; Kinney, Irrig., §57.

at least, that the current of the stream shall be returned to its original bed before leaving the land of the user.[4] This is implied in the term "riparian." But this does not mean that the use shall be confined to strictly riparian lands. On the contrary, the courts have frequently held that the extent of the exercise of the use of the water is not to be determined by the area or contour of the land, but by its effect upon other riparian proprietors.[5] In general, the right of a riparian owner to appropriate the water is limited to his use for such purposes, to such an extent and in such a way as will not be inconsistent with a similar use by the lower owners.[6] Since the effect upon the lower riparian proprietor is made the test, it would make little difference whether the water was taken for use on riparian or non-riparian lands, just so long as it did not essentially interfere with the exercise of the common right by the other riparian owners. If the use is lawful and beneficial, it must be deemed to be reasonable, and not an infringement of the right of other riparian owners to whom it occasions no actual and perceptible damages either as to the present or future use of the riparian land.[7] The question in such a case is not whether the diversion being for a legitimate use and in quantity such as is reasonable, having regard to all the circumstances, but only whether it causes actual damage to the person complaining.[8] Were it otherwise, points out Mr. Chief Justice Shaw in *Elliot* v. *Fitchburg R. Co.*, and were it an inflexible rule that each lower proprietor has a right to the full and entire flow of the natural stream without diminution, acceleration or retardation of the natural current, it would follow that each lower proprietor would have a right of action against any upper one for taking any portion of the water of the stream for any purpose.

The riparian proprietor's right to appropriate the water for his domestic use and also for watering his cattle is not, however, accord-

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[4] Kensit v. Great Eastern R. Co., L. R. 27 Ch. Div. 122 (Eng. 1884); 3 Kent. Comm. 439, "though the riparian owner may use the water while it runs over his lands, he cannot unreasonably detain it or give it another direction, and he must return it to its ordinary channel when it leaves his estate."

[5] Jones v. Conn, 39 Or. 30 (1901); Ulbrecht v. Eufawla Water Co., 86 Ala. 587 (1888); Moulton v. Newburyport Water Co., 137 Mass. 163 (1884); Norbury v. Kitchin, 9 Jur. (N. S.) 132 (Eng. 1863); Miner v. Gilmour, 12 Moore, P. C. C. 131 (Eng. 1858), "each proprietor may use the water for any other purpose provided he does not interfere with the rights of other proprietors above or below him."

[6] 3 Kent. Comm. 439; Elliot v. Fitchburg R. Co., 10 Cush. 191 (Mass. 1852); Garwood v. N. Y. C. & Hudson R. Co., 83 N. Y. 400 (1881); Mason v. Hill, 5 Barn. & Adol 1 (Eng. 1833); Acton v. Blundell, 12 Mees. & W. 324 (Eng. 1843).

[7] Elliot v. Fitchburg, *supra;* Kensit v. Great Eastern R. Co., *supra;* White v. Whitney Mfg. Co., 60 S. C. 254 (1900); Baily & Co. v. Clark (1902), 1 Ch. 649 (Eng.); Harris v. R. Co., 153 N. C. 542 (1910).

[8] Fifield v. Spring Valley Waterworks, 130 Cal. 552 (1900).

ing to the weight of authority, limited by considerations of the necessities of lower proprietors, and he may use the water for these "ordinary" purposes, even though the effect be to exhaust the supply.[9] On the other hand, his right to appropriate the water for what are considered "extraordinary" uses, such as manufacturing, irrigation, and others, is restricted by the requirement that such appropriation must not so diminish the flow of water as to materially injure other proprietors lower down,[10] or, as stated by others, his use of the water must not be unreasonable, having regard to a like use by the lower proprietor.

There are numerous decisions to the effect that the rights of a riparian proprietor do not extend to uses on land outside the watershed. In such cases, however, the fact appears that actual damages were caused by the diversion.[11] In *Paterson* v. *East Jersey Water Co.*[12] it was held that the uses of water of a flowing stream must, in order to be reasonable, be consistent with the occupation and enjoyment of the riparian lands; and, where a water company diverts such a perceptible quantity as to exclude the application of the maxim, *"De minimis non curat lex,"* and such water is used to supply its customers, some of whom are located in a different watershed, such use is unreasonable and entitles a lower riparian owner to relief by injunction without proof of actual damage. Here, however, the court said the continuance of such diversion may ripen into a right of appropriation by prescription.

In reason, there seems to be no distinction between diversion of water from a stream for use in the locomotive engines of a railroad, which of necessity consume the water by evaporation on their journeys without perceptible return to any stream, and the diversion of water for any other legitimate use outside the watershed and upon non-riparian land. Whether such a use for locomotive engines is within the rights of riparian ownership has been the subject of somewhat variant conclusions as to the fact of reasonableness. A corporation with the right of eminent domain, which takes the water of a stream for its corporate uses, not by exercise of its right as such, but by virtue of its rights as riparian owner, has no other or higher rights in the water than an ordinary riparian owner.[13] Sometimes the size and capacity of a stream has an im-

[9] Gould, Waters, §205; Spence v. McDonough, 77 Iowa, 460 (1889); Anthony v. Lapham, 5 Pick. 175 (Mass. 1827).

[10] Embrey v. Owen, 6 Exch. 353 (Eng. 1851); Wheatley v. Chrisman, 24 Pa. 298 (1855); Gould v. Stafford, 77 Cal. 66 (1888); Anderson v. Cincinnati So. R. Co., 86 Ky. 44 (1887).

[11] Williams v. Wadsworth, 51 Conn. 277 (1883); Bathgate v. Irvine, 126 Cal. 135 (1899).

[12] 74 N. J. Eq. 49 (1908); affirmed 77 N. J. Eq. 588 (1910).

[13] McCartney v. Londonderry & Lough Swilly R. Co. (1904), A. C. 301 (Eng.); Garwood v. N. Y. C. & Hudson R. Co., *supra;* P. R. R. v. Miller, 112 Pa. 34 (1886).

portant bearing upon questions of this nature,[14] which are to a considerable extent questions of degree, depending for determination upon the circumstances of each particular case. Sometimes the law will say what is a reasonable use. Thus they hold in New Jersey, that the sale of a right to take water for use on non-riparian lands is unreasonable as a matter of law, if thereby another riparian proprietor sustains palpable damage.[15] However, it is the general rule that the question of reasonableness is one of fact and for the jury to determine from all the circumstances.[16]

S. L. M.

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[14] Wheatley v. Chrisman, *supra*, note 10.

[15] Higgins v. Flemington Water Co., 36 N. J. Eq. 538 (1883).

[16] Norbury v. Kitchin, 9 Jur. (N. S.) 132 (Eng. 1863); Gillis v. Chase, 67 N. H. 161 (1891); Hetrich v. Deachler, 6 Pa. 32 (1847).