"PERSONAL BAGGAGE" AS A MATTER OF LAW.

In *McIntosh v. Augusta & A. Ry. Co.*, 69 S. E., 159, the plaintiff had been refused admittance to a street car because he was carrying a five-cent piece of ice, the conductor claiming that the ice was not properly packed, so as to prevent leakage, and that he was acting under the authority of a rule of the defendant com-
pany, which forbade passengers to carry bulky and dangerous packages aboard the cars. It has been proven on trial that the ice was so packed as to prevent leakage, and the Court decided that as a matter of law, it could not say that ice was not personal baggage.

As to the amount and nature of goods that may be carried as personal baggage some very interesting questions have arisen for settlement by the courts. In Connolly v. Warren, 106 Mass., 146, it was held that a feather bed was not personal baggage, inasmuch as it was not appropriate nor necessary for the personal use of one while travelling. In Little Rock & Hot Springs Western Railway Co. v. Record, 74 Ark., 125, it was held that two shot-guns were personal baggage, as they were carried by the traveller on a hunting trip.

Jones v. Vorhees, 10 Ohio, 140, decided that inasmuch as stage coaches were common carriers, a watch left in a trunk was part of a traveller's personal baggage and that they were liable therefor.

It is generally held, however, in deciding what is to be considered personal baggage and what is not, that it is a matter for the jury and not for the court to pass judgment on. When the duty falls upon the jury to decide as to what shall and shall not be classified as personal baggage, the question which presents itself is what circumstances shall the jury consider when so deliberating. Morris v. Bay State Steamboat, 4 Bosw., 225, in holding that it was a question of fact for the jury to decide what personal baggage was, also added that, in so deciding, the residence of the passenger should be taken into consideration.

Little Rock & Hot Springs Western Railway Co. v. Record, 74 Ark., 125, held personal baggage to be whatever a passenger took with him for his personal use and convenience, based upon the wants of the particular class to which he belongs, either with reference to the immediate necessities, or to the purposes of the journey. Consequently, it would seem that there are four requisites for the jury to consider, which may be classed as follows: the passenger's residence; his station in life; the purpose of the journey; and the necessities required for such a journey.

In McIntosh v. Augusta & A. Ry. Co., 69 S. E. Rep., 159, the case at hand, it seems that the learned judge has taken upon
himself to lay down a matter of fact as a rule of law, and his action is almost without precedent. His position may be justified, however, as circumstances often alter cases. For in this case the ice was for a sick man. In times of sickness certain articles are very necessary and it is often most urgent that they should be speedily procured, and ice is often as much of a necessity as medicine. Considering ice as a necessity in the present case, the next question is, can it be classified under any one of the four requisites above mentioned. It seems possible to consider it as coming under the head of the purpose of the journey.

The utmost expedition was required in the plaintiff's mission and the article required was ice, consequently the whole question was dependent upon circumstances, and it was undoubtedly in this light that the court so regarded it.

It seems proper under these circumstances to classify ice as personal baggage, considering it as a necessity and inherent in the very purpose of the journey. However, it is not always desirable to establish precedents, for this question could have as easily been decided by jury and would undoubtedly have gained more favor. For the true rule seems to be, as laid down and emphasized most decisively in *Brook v. Gale*, 14 Fla., 523, that it is improper for a judge to decide what personal baggage is, because it is a question of fact and should be left to the jury.

**STATUTORY LIABILITY OF STOCKHOLDERS ON THE REORGANIZATION OF A CORPORATION.**

In the reorganization of an Ohio railroad company, the new company assumed the debts of the old, and provided for an issue of first-lien bonds to be sold, and the proceeds to be used to pay such indebtedness. Under the statute of the state, the stockholders were subject to double liability, but such bonds contained a provision by which the holders waived the right to resort to such liability in consideration of the lien given. It was held in *Irvine v. Baulcard*, 181 Fed., 206, that a stockholder of the old company who became a party to the reorganization and exchanged his stock for stock in the new company was subject to the additional liability for the debts of the old company so far as they were not discharged from the proceeds of the bonds sold.
"The term reorganization has no very definite meaning in the law of corporations, but is applied indifferently to various proceedings and transactions by which succession of corporations is brought about, and also to proceedings by which existing corporations are continued under a different organization without the creation of a new corporation." Marshall on Private Corporations, p. 455.

The general rule is that a new corporation organized to succeed the old corporation is not liable for the debts of the latter Wiggins Ferry Co. v. Ohio & Miss. Railway Co., 142 U. S., 396. The new corporation will be responsible for the debts of the old however, where (1) circumstances are such as to warrant the conclusion that the new corporation is not a separate and distinct corporation, but merely a continuation of the old corporation and hence the same person in law. Benesh v. Mill Owners' Mutua Fire Insurance Co. of Iowa, 103 Ia., 465, or (2) where it has by express terms or by reasonable implication assumed the debts of the old corporation. Fernschild v. Yuengling Brewing Co., 15. N. Y., 667.

It is well settled that stockholders of a corporation are not personally liable for debts of the corporation, either at law or in equity, unless such liability is expressly imposed by the charter, or by some statutory or constitutional provision. Salt Lake City National Bank v. Hendrickson, 40 N. J. L., 52. "The reason is that a corporation is a legal entity or artificial person distinct from the members who compose it, in their individual capacity, and when it contracts a debt, it is the debt of this legal entity or artificial person—the corporation—and not the debt of the individual members. Marshall on Private Corporations, p. 10.

Sometimes a constitutional or statutory provision declares that stockholders shall be individually liable to creditors of the corporation to the amount due on their stock. Paterson v. Lynde, 112 Ill., 196.

As a general rule the liability so imposed on stockholders is neither limited to the amount due on their stock, nor unlimited, but is for an amount equal to the nominal or par value of their stock, in addition to what they may have paid, or may be due thereon. It imposes in effect a "double liability." Root v.
Sinnock, 120 Ill., 196; Willis v. E. L. Mabon et al., 48 Minn., 140. The liability of stockholders under some state statutes for debts of the corporation “in double the amount of the par value of the stock owned by them respectively” is double the amount of such value in addition to their liability to the corporation on their original subscription. Zang et al. v. Wyant et al., 25 Col., 551. Moreover, the individual liability, equally and ratably, of stockholders under the charter will not be increased by the insolvency of other stockholders, or the fact that some of them are beyond the reach of process. Maine Trust & Banking Co. v. Southern Loan & Trust Co., 92 Me., 444.

As to the liability of stockholders in a reorganized corporation, if any stockholder of the old corporation refuses to come into the reorganization agreement, he cannot be compelled to do so. He may insist on his rights as a stockholder and prevent any reorganization which will affect the rights secured to him by his contract with the company. Hollister v. Stewart, 111 N. Y., 644; Lake St. El. v. Ziegler, 99 Fed., 114. Any party, however, whether a stockholder, bondholder or other creditor, or the corporation itself, who enters into a valid agreement for the purpose of reorganization, is bound thereby and cannot repudiate the same and insist upon his original rights in violation of its terms, either before or after the agreement has been carried out. Dester v. Ross, 85 Mich., 370; First Nat'l Bank of Chattanooga v. Radford Trust Co., 80 Fed., 569. But an agreement for reorganization like any other contract, is not binding unless the promises of the parties are supported by a consideration. Providence Albertype Co. v. Kent & Stanley Co., 19 R. I., 561.

In the case at hand the defendant by assenting to the reorganization agreement, became as much bound by it as if he had signed it and he became a stockholder of the reorganized company and as such became subject to the liability imposed by the Ohio statute.

So, although ordinarily a stockholder is not liable for the debts of a corporation in the absence of statutory or charter provisions making him so, and although a reorganized corporation is not for that reason alone liable for the debts of the old corporation, yet a stockholder who joins a reorganization agreement, whereby the reorganized corporation assumes the debts of
the old corporation becomes liable for the debts of the corporation under a statute imposing a double liability upon stockholder

PRIVY EXAMINATION OF MARRIED WOMAN BY TELEPHONE AS TO HER EXECUTION OF A DEED.

Very few adjudicated cases are to be found in the books upon this exact point because of the fact that certificates of acknowledgement are usually conclusive of the facts contained therein.

The acknowledgement is no part of the deed itself and the certificate is sufficient if it shows that the requirements of the statute have been in substance complied with. Burbank v. Ellis, 7 Neb., 156, 164. And the failure of the notary to make a proper certificate of acknowledgement will not invalidate the deed. Linderman v. Axford, 56 N. Y. Supp., 456. It has reference to the proof of the execution, not to the force of the deed itself, especially where third parties are concerned. Murray v. Beal, 65 Pac. (Utah), 726. What constitutes an acknowledgement is well defined in Steers v. Kinsey, 68 Ark., 360.

In a recent case, Wester v. Hurt, 130 S. W. (Tenn.), 842, the wife had joined with her husband in a deed of trust of her land to secure the debts of their son. In an effort to avoid the enforcement of the deed, it was proved that the privy examination of the wife, as required by statute, had been taken by the notary over a telephone. The court held that this was not a compliance with the statute, and that the deed was therefore void.

Opposed to this decision is the case of Banning v. Banning, 80 Cal., 271. This was an action for the partition of land. At the time of the making and acknowledging the deed, the defendant was a married woman and her acknowledgement was taken by a notary through a telephone while she was three miles away. It was contended that the woman not being visibly present and therefore not personally present before the notary at the time, that the deed had not been executed and therefore the plaintiff could claim no title. But the court declared that in the absence of fraud, accident, duress, or mistake, the certificate of the notary in due form of law is conclusive of the material facts thereupon stated.
The position of the court in this case seems to be supported by the weight of authority. In *Baldwin v. Snowden*, 11 Ohio St., 203, the court held that a regular statutory certificate of the acknowledgement of a deed of conveyance, made by a husband and wife, is, in the absence of fraud, conclusive evidence of the facts stated therein. In a Nebraska case, Smith and Smith were partners in business and secured their accounts with their bank by a mortgage on their homesteads. Their wives signed the mortgages when presented to them by a notary, but later denied that there ever was any formal acknowledgement of their signatures to the notary. The court held that the certificate of an officer having authority to take acknowledgements can not be impeached by showing merely that the officer's duty was irregularly performed. In *Tichenor v. Yankey*, 89 Ky., 508, the court would not permit the defendant to show that the deed had not been voluntarily executed by her even where there was a mistake in the description of the land so that the wrong piece of land was mortgaged. This is the acknowledged rule that the officer's certificate will in the absence of fraud be conclusive in favor of those who in good faith rely upon it. *Bank v. Smith*, 59 Neb., 90. It must be alleged and proved that some fraud has been practiced on the married woman before the court will permit the acknowledgement to be impeached. *Jones on Mortgages*, I, sec. 538.

Perhaps the nearest direct decision affirming the principal case to be found in the books is the case of *Sullivan v. First National Bank*, 37 Tex. Civ. App., 228. In this case, a motion was made for a continuance on account of defendant's sickness. An affidavit was made signed with the defendant's name by his attorney. The clerk's jurat to the affidavit showed on its face that defendant had sworn to it and had authorized its signature over the telephone. The court refused to consider the application on the ground that it could not be properly sworn to over a telephone. But the court very clearly sets forth the fact that the legislature must have had in mind the formalities of an oath when they prescribed the manner in which it should be taken. It says that while the statute does not require that an affidavit to an application be made by the party to the suit, it must be sworn to and the necessary formalities of an oath must attend the administration of the oath. It is necessary to the validity of every oath or affirmation, not alone that it shall be binding on the conscience of the affiant, but that it be made under the pains and penalties of
perjury. The law requires the affiant to be in the personal presence of the officer administering the oath, to the end that he be certainly identified as the person who actually took the oath. The legislature had in mind the meaning of the oath as well as its history. In early times and in other states certain forms and formalities are observed—raising the right hand, laying the hand on the Bible, the Pentateuch, or the Koran—all seeking to bind the conscience of the affiant. These contemplated his presence before the officer. The oath must be administered in a manner in which the affiant could be made to answer to the pains and penalties of perjury in the event that the oath should prove false. In order that prosecutions for perjury may be sustained it is required to be established beyond a reasonable doubt that an oath has been legally made, that the matter sworn to was false in fact, and that the defendant in the prosecution is the one who made the oath. The fact that the clerk recognized the affiant's voice is not sufficient. The clerk must be able in the event of a prosecution for perjury to identify the affiant as the one who signed and swore to the affidavit and to be able to do this would require the affiant's actual personal presence at the time of administering the oath.

The general law of the use of the telephone is set forth in Central Union Telephone Co. v. Falley, 10 Am. St. Rep. (Ind.), 114 and note. That the telephone by the necessities of commerce and public use, has become a public servant, a factor in the commerce of the nation and of a great portion of the civilized world, can not be disputed. As telephones are used by all classes of persons for business purposes, some legal effect must be given to conversations held over them. Where both parties resort to this method of communication, they must intend some legal effect to follow. If they are not willing to assume the risks incident to the mode, they should decline to resort to it or to permit others to communicate to them in that manner. State v. Nebraska Telephone Co., 17 Neb., 126. Telephone communications are usually held to be admissible in evidence and even though the voice of the party is not recognized it does not affect the admissibility, but merely the weight of the evidence. People v. Ward, 3 N. Y. Crim. Rep., 483, 511.

The courts of justice do not ignore the great improvements in the means of intercommunication which the telephone has made.
Its nature, operation and ordinary uses are facts of general scientific knowledge, of which the courts will take judicial notice as parts of public contemporary history. When a person places himself in connection with the telephone system through an instrument in his office, he thereby invites communication, in relation to his business through that channel. *Wolfe v. Mo. Pac. Ry. Co.*, 97 Mo., 473.

It would seem from the general recognition given by the courts to the telephone as a commercial necessity and the conclusiveness of the officer's certificate of acknowledgement that an acknowledgement and examination of a married woman as to her execution of a deed, if taken over a telephone, could not be impeached for that reason alone.

**Estoppel of the State to prosecute for a crime by reason of its officers having entrapped the accused into its commission.**

In the recent case of *De Graff v. The State*, 103 Pac. (Okla.), 538, the first of its kind since the adoption of the State Constitution, the Oklahoma Criminal Court of Appeals decided that the state may convict an offender of its liquor laws, even though all of the testimony against him was obtained while offering inducements to the defendant to break such law by a person in the employment of the prosecuting officer for that purpose only.

Evidence given by persons who have bought liquor for no other purpose than to obtain evidence against the defendant upon which to base a prosecution, has been given to juries with the charge that they were to examine it with caution and if there was any craft or indirect contrivance in procuring the testimony, they were to examine it with the greatest care and caution. *Commonwealth v. Graves*, 91 Mass., 114. Yet if the evidence was procured by the witness while acting to ferret out crime without guilty intent, his testimony should need no corroboration and such witness should have the same standing as any other. *Wright v. The State*, 7 Tex. App., 574. The case of *Saunders v. The People*, 38 Mich., 218, decided that it is proper to subject the witness to close cross-examination, and though not directly in point, it gives us by analogy some idea of what weight a great
judge might give such testimony. In this case, Webb, a police officer, upon being asked by the defendant to leave the court room door unlocked, informed his superior of the request and together they caught an accomplice of the defendant's who came through the door and attempted to take some bonds. Judge Cooley, in commenting upon the evidence given by the police officer, says: "Webb was an important and necessary witness in the case, and the conviction of the defendant must, so far as we can understand from this record, have depended upon the belief of the jury in his evidence to conversations had with the defendant. That evidence was open to unfavorable inferences; and without saying that such inferences should have been drawn, my brethren think the record should have permitted very searching cross-examination under the circumstances. If he testified truly, he was apparently conniving at and assisting in the crime charged; and though he may have done this, as he says, not by way of enticing the defendant into crime, but only by allowing him the opportunity he sought and requested, yet it placed him in an equivocal position, and the jury ought to have had the benefit of all the light the former dealings of the parties would have thrown upon the transaction. And although a question to the witness which implied rascality to the defendant himself as well as the witness, seems extraordinary, yet it may have tested the credibility of the witness as well as any other, and his credibility in the case was quite as much involved as the defendant's guilt."

To prohibit such testimony by a rule of evidence would, of course, be destroying a valuable agency in the enforcement of the liquor laws, yet a charge to the jury might in some cases have that effect and before deciding to limit its effect the trial judge should examine it with as much care and caution as he directs the jury to use.

In Maine, the fact that incriminating evidence against a liquor law offender was secured by a detective, was considered immaterial. *State v. Rollins*, 77 Me., 380. Nor does the fact that they aid in committing the crime for the purpose of securing such evidence make them accomplices. *State v. Baden*, 37 Minn., 212.

Against the majority holding, laid down in the principal case, a directly opposite view has been taken by the Colorado Court of Appeals which seems to be entirely of Colorado origin. In the leading case of *Ford v. The City of Denver*, 10 Col. App., 500
(1898), the defendant, a druggist, sold a prohibited quantity of spirits without the protection of a license or a doctor's prescription. In reversing the lower court, Thomson, P. J., says: "It appears that the city was instrumental in procuring the sale of the liquor. Its purpose was to lay the foundation for a suit. * * * * The city is in no position to say that its ordinance was violated. It was as much responsible for the sale of the liquor as the defendant, and will not be permitted to replenish its treasury from the penalties incurred at its instigation. It cannot be heard to complain of an act the doing of which is solicited." In State v. Braisted, 13 Col. App., 532, the defendant was fined upon doubtful evidence procured by a woman who bought a quantity of alcohol under the direction of the town attorney. In following Ford v. The City of Denver, supra, the Court of Appeals said: "So far as appears, the sole object the attorney had in view, was to procure a violation of the ordinance in order that a prosecution might be instituted against the offender and a penalty recovered from him. * * * * It is entirely clear that the liquor, if it was purchased at all, was not purchased for the private use of any person. It was purchased to involve the seller in a violation of the ordinance, in order that the town attorney might be able to pursue him for a penalty. It was peculiarly the duty of the town attorney, in view of the office which he held, to uphold the ordinances of the town and to discountenance their violation. So far as we can see, his motive was to compel the victim to pay his money into the town treasury. It would be contrary to good morals to allow the plan to succeed. Public policy will not permit a municipality to derive profit from unlawful acts which are deliberately instigated and contrived by its officers." Wilcox v. People, 17 Col. App., 109.

The true rule in accordance with the weight of authority and denied, it seems, only by the above Colorado cases, is adopted by the Oklahoma Criminal Court of Appeals in the principal case. Here the defendant was indicted for violating a liquor law upon evidence secured by a person who had drunk liquor sold him by the defendant, which he bought with one dollar that the county attorney had given him to use in seeing if anyone was violating the law. The court in its opinion says: "We cannot agree with the reasoning of the Colorado Court. It would be applicable to that class of crimes in which the want of consent of the owner of the property to its taking or destruction was a necessary ele-
ment in the offense. The owner of the property taken might by his conduct in employing a detective to entrap a person suspected of crime, destroy the element of want of consent to such taking and hence no crime would be committed."

An attempt to harmonize State v. Braisted, supra, with the case in hand would be unsuccessful unless there is a difference in the degree of guilt in the sale of liquor—contrary to law—to a person who does not intend to use it (of which the seller will probably know nothing) and a sale which is disposed of upon the spot. That would be taking away part of the penal effect of a penal statute. Under a liquor statute, the buyer is not guilty of a crime, at least legally, but the statute means that whoever violates it shall be held guilty under any circumstances. Comparing the cases farther we find a direct conflict of opinion as to what is the better public policy under the same circumstances. The Colorado decision seems to go without the letter of the law and excuses a crime which has been perpetrated upon the public by the defendant with at least constructive intent. Surely it is impossible to say that the public officer, by whom the purchase of liquor was proposed, aided such intent. The act and intent are there. It is a crime and legal acts of other persons, although morally questionable, are unworthy of legal cognizance for the purpose of mitigating that crime.

Crimes of this nature are difficult to detect and prove. If it were inadmissible to introduce such evidence, a dealer engaged in the illegal sale of liquor would rarely be apprehended and our laws would be winked at. Instead of putting an offender in fear of the law it would make him feel safe in violating it.

LIABILITY OF EMPLOYER FOR THE PERMISSIVE WRONGFUL USE OF HIS PREMISES BY HIS EMPLOYEES TO THE INJURY OF THIRD PERSONS.

In the case of Hogle v. Franklin Mfg. Co., New York Law Journal, Vol. 44, No. 27, the defendant permitted its employees, for a period covering several months, to throw bolts, nuts, and other small pieces of iron from the windows of its factory, upon the plaintiff's adjoining lot, during working hours. Plaintiff secured and took several of the missiles thus thrown to the
president of the defendant corporation and was assured that such action as was necessary would be taken to stop this dangerous practice. Plaintiff's lessor notified the general manager of the defendant corporation many times of the existence and the continuance of these trespasses which were so frequent and of such a nature as to become not only dangerous, but a nuisance as well, and asked that he see that such acts be abated.

Through the wantonness and disregard or malice of the defendant's employees, the plaintiff sustained a severe injury and brought this action upon the grounds of negligence and nuisance. The defendant corporation contended that there could be no recovery unless the jury should find, that these pieces of iron were thrown upon the plaintiff's premises as a necessary consequence of the work being carried on there, or as an incident to it, and also argued that its workmen were not acting within the scope of their employment while perpetrating these acts, and that therefore an action for negligence would not lie.

The lower court did not so hold in deciding the case and rendered a judgment of negligence against the master, which was later set aside by the trial justice on the ground, as above stated, that the acts were not committed by the servant while in the scope of his employment, or performing some act incident to it.

It seems that this point of law—the scope of employment—has been carried farther or construed more liberally than was originally intended. The courts are practically unanimous that the employee must be doing some act, in or incident to the employment to render the master liable, but the circumstances are so peculiar in this and parallel cases, that justice seems to be defeated, when the phrase, scope of employment, is permitted to have any bearing whatsoever, in determining a verdict.

As this case logically should be determined upon—the use of property—it is well for us to look at the general rule, which holds, "That no one has absolute freedom in the use of his property, but is restrained by the co-existence of equal rights in his neighbors to the use of their property, so that each in exercising his rights must do no act which causes injury to the other." *Booth v. Rome*, 140 N. Y., 267.

There is an ancient maxim, *sic utere tuo ut alienum non laedas*, which is the foundation of this well established rule, that no one
may make an unreasonable use of his own premises to the material injury of his neighbor, and if he does, the latter has a right of action, provided the enjoyment of life and property is materially lessened. *Campbell v. Seaman, 63 N. Y., 568.*

The master in this case, with a right to direct and control his servants and their methods of accomplishing his work, permitted them to continue in and about his premises, after having received notice, that wilful and malicious acts had and were being committed under color of his employment, and *Dinsmoor v. Wolber,* 85 Ill. App., 152, holds, that the master is liable for all injuries suffered by third parties through reason of such wrongful use of his property, whether such acts committed are wilful or only careless. "Wilful" is held to mean, "Such a gross want of care and regard for the rights of others as to imply a disregard of consequences of an injury inflicted." *Cleveland C. C. & St. L. R. R. Co. v. Cline,* 111 Ill. App., 416. "Careless" is defined as, "A failure to exercise such care as the circumstances require." *Norfolk Beet Sugar Co. v. Preuner,* 55 Neb., 656.

In deciding this case the court said, that had the action been brought on the single issue of nuisance it would have been sufficient in determining that the use made of the property constituted a nuisance that, in this case, the property was to the master's knowledge, being used as a means whereby dangerous trespasses were being habitually committed, to the extent of inflicting substantial injuries, and would therefore be such a use as would be held a nuisance. The defendant may be liable as trespassor, although negligence is not established. *Sullivan v. Dunham,* 161 N. Y., 290.

In examining whether or not this constituted a reasonable use of property, we find that if the act committed is of such a nature that injury may be inflicted upon person or property, it may become a nuisance as a matter of fact, but when the acts are such that the injury to person or property is the only natural consequence, it should be held a nuisance as a matter of law. *Melker v. City of New York,* 190 N. Y., 481.

In the case under discussion the master had received many notifications of the use to which his property was being put and
was well aware of the dangerous practice that was being carried on, and when he did not employ the diligence necessary and owing to the public to see that the windows were closed or to detect the guilty parties and dismiss them from his service, such disregard would be sufficient to imply a ratification of the acts of his employees. Cobb Simon, 119 Wis., 597. The court said that the retention of a servant in the employ of the master after notice to the principal of a tort committed by the servant, is evidence of the ratification of the act by the principal, but the information to the principal must, as it was in this case, be full and complete.

In his decision of this question, there can be no doubt that the trial judge erred in setting aside the verdict upon the ground, that as the acts of the defendant’s workmen were not done within the scope of their employment, an action for negligence would not lie. The acts were sufficient, as found by the jury to exist, to charge the master with the negligent conduct of his business, or to have based the finding upon the wrongful use he permitted to be made of his property, which resulted in the maintenance of a nuisance, and as such the judgement of the Court of Appeals in so finding should be approved.

COMPULSORY CONSTRUCTION OF INDUSTRIAL SIDETRACKS.

The question of shipper’s constitutional right to demand of a common carrier the construction of a spur track to his place of business has been variously treated in this country. Some of the states have provided for this matter by the enactment of statutes, others by making it subject to regulation by commissions, and one state has gone so far as to devote to it a section of its constitution. Where the legislatures have been silent the courts have, of necessity, laid down the law, and they, too, have disagreed. A recent decision bearing on this point is to be found in the case of the Northern Pacific Ry. Co. vs R. R. Commission, in 108 Pac. (Wash.), 938.

In this case a shipper, operating a sawmill at a point about midway between two recognized stopping places and at some distance from the main line of the railroad, petitioned the Railroad Commission to issue an order requiring the construction of
a spur. The Commission found the facts as stated and issued the order. This appeal was prosecuted from a judgment of the lower court affirming the order of the Commission and resulted in a reversal of that judgment by the Supreme Court. That court upheld the contention of the railroad company that such an order was the taking of private property without due process of law, and that it contravened the fourteenth amendment of the Federal Constitution. The Commission based its order on the theory that it was promotive of public good and within the recognized police power of the State.

The legislature of North Carolina touched upon this subject when, in the statute which created its Corporation Commission, the power was conferred on that body, “To require the construction of sidetracks by any railroad company to industries already established, or to be established, provided it is shown that the proportion of such revenue accruing to such sidetrack is sufficient within five years to pay the expenses of its construction.”

Since industrial sidetracks are contributing elements in the development of interstate commerce it might well be expected that Congress would have given them some attention. The Hepburn Law of 1906, 34 Statutes at Large, 585, in extending the powers of the Interstate Commerce Commission, makes this provision: “Any common carrier, subject to the provisions of this act, upon application of any lateral, branch line of railroad, or of any shipper tendering interstate traffic for transportation, shall construct, maintain and operate upon reasonable terms a switch connection with any such lateral, branch line of railroad, or private sidetrack which may be constructed to connect with its railroad where such connection is reasonably practicable and can be put in with safety and will furnish sufficient business to justify the construction and maintenance of the same.” It is significant that both these legislative enactments are careful to provide compensation for the railroad should it be required to construct a sidetrack. Failure on the part of petitioners for sidetracks to assure the railroads an indemnity for the construction and maintenance of such sidetracks has been the chief cause of the courts’ refusing to order the railroads to comply with these demands.

The two Nebraska cases, Missouri Pacific Ry. Co. vs. Nebraska and Missouri Pacific Ry. Co. vs. Farmers’ Elevator Co., both re-
COMMENTS

ported in 217 U. S., 196, which were cited in the principal case, and upon which the court based its opinion, were decided favorably to the petitioners in the state court, but were reversed by the United States Supreme Court. That court held that a statute which declared that a railroad, without any preliminary hearing, must construct a sidetrack at the demand of a shipper, was not to be justified as an exercise of the police power, but that compliance with such statute would be regarded as the taking of private property without due process of law, even if construed as operating only when demand for such facilities was reasonable.

The legislative acts mentioned above comply with the demands of the United States Supreme Court in that they require an indemnity. Furthermore "the due process of law" requirement is satisfied, for a judicial hearing is absolutely necessary to determine the sufficiency of the indemnity.

Although the federal legislature had been silent on this subject until 1906, Illinois regarded it as of such importance that when a new constitution was adopted in 1870 a section was devoted to it. It reads in part as follows: "All railroad companies shall permit connections to be made with their track, so that any such consignee, and any public warehouse, coal bunk, coal yard, may be reached by the cars on the said railroad.

By what means are railroads to be forced to comply with the demands of shippers that spur tracks be constructed? In Illinois, it has been held that after a shipper has petitioned the Railroad Commission and the railroad continues its refusal to construct, mandamus will lie. Likewise in Illinois mandamus lies under statutory provision. State vs. Chicago, St. Paul, Minneapolis, and Omaha R. R., 19 Neb., 476; Chicago & Alton R. R. Co. v. Suffern, 129 Ill., 274. Where the railroad itself wishes to acquire property for the construction of new lines the power of eminent domain is exercised. The all-embracing police power was the authority used by the Commission in the principal case in its attempt to compel the railroad to grant the petitioner's request. The demands of the courts that must be complied with are opposed to certain characteristics of the exercise of the police power. When the police power is exercised and property taken the owner is not compensated because such taking is regarded as damnum absque injuria and because in theory the owner is sufficiently benefited
by sharing in the general good that results. The police power is exercised only for the purpose of promoting the public welfare. The object must be regulation and not the raising of revenue. This power is usually exerted merely to regulate the use and enjoyment of property by the owner, or if he be deprived of the property outright it is not taken for public use, but rather destroyed in order to promote the public welfare. If the courts insist that the railroads be compensated whenever they are compelled to construct a sidetrack it would seem that the compelling force could not be regarded as an exercise of the police power. However the courts do not always insist that the indemnity be made. For example in the case of Ry. Co. vs. Florida, 42 Florida, 358, a law which required intersecting railroads to construct such switches, sidetracks and connections as would permit the transfer of cars from one road to the other was held to be a reasonable exercise of the police power.

The proper exercise of the police power is for the protection of safety, order and morals. That this power is often extended to include public-convenience is well known, though Freund in his work on “The Police Power” questions the propriety of calling a regulation for public convenience an exercise of the police power. But in Escanaba Co. vs. Chicago, 107 Ill., 678, the court said: “But the states have full power to regulate within their limits matters of internal police, including in that general designation whatever will promote comfort, convenience and prosperity of their people.”

The fifth article of the amendment of the Federal Constitution reads in part as follows: “Nor shall private property be taken for public use without just compensation.” Most of the state constitutions have limitations upon the power of the state to condemn private property except for public use. However many of the constitutions leave in the state just such powers as it had without limitation.

Thus it may be said that the decision in the principal case is essentially in agreement with the weight of authority. Railroads are not, in the absence of constitutional and statutory provision, required to construct industrial sidetracks. Further, the use of such sidetrack must be a public one. In most states the deter-
mination of the public nature of the use is left to the legislature. Section 16 of Article 1 of the constitution of Washington provides that such determination shall be made by a court. Colorado and Missouri have similar constitutional provisions. The courts are not prone to regard a use of property a public one merely because it is clothed with a public interest as in the case of those industries which develop the natural resources of a state and are therefore said to aid in the development of the state and the prosperity of the people. The sidetrack may be for a private use, and compensation must be made to the railroad: and the power under which a state may require a railroad to construct such a side track is more of an exercise of the power of eminent domain than of the police power.