RECENT CASES.

CHANGE OF VENUE—INTEREST OF JUDGE—PREJUDICE—AFFIDAVIT—INFORMATION AND BELIEF—APPEAL—HIGGINS ET AL. V. CITY OF SAN DIEGO ET AL., 58 Pac. 700 (Cal.).—Water company had claim against city for use of plant, contingent on sufficient funds in treasury to pay claim, when accrued. *Held*, that interest of judge, who was taxpayer, was too remote to disqualify, though judgment might be foundation of a special tax; and interest being made a special ground of disqualification, cannot be alleged in support of bias; that (1) a *controversy* between city and water company, causing feeling among taxpayers, including judges; (2) a controversy and exchange in newspapers of threats between judge and water company; (3) censure in court of attorney of water company by judge, and resenting of statements in an affidavit by judge, do not show prejudice sufficient to disqualify the judge. *Mere* affidavit on information and belief, unattended by proof, is not sufficient to authorize change of venue.

The Code of Civil Procedure of the State of California contains a provision, now common in many States, that a judge interested in the litigation is disqualified from sitting. The present case, while recognizing that in accordance with American decisions, a judge who is a taxpayer possesses a definable, pecuniary interest, which will be affected directly by a judgment in an action for money damages against a city, yet gives new weight to the distinction which is the essence of the weight of American authority, his distinction is that if the affection of the pecuniary interest of the judge is contingent and dependent upon events subsequent to the rendition of the judgment, that the interest of the judge is too remotely involved and too indirectly affected to create a disqualification. *People* v. *Edmonds*, 15 Barb. 531. In the present case the possibility was contingent, and as this supposed interest was alleged as a special ground, it was not considered in a second count alleging bias. The final clauses of the decision are well settled law, for in no instance has an affidavit on information and belief standing alone been creative of a change of venue. *People* v. *McCauley*, 1 Cal. 379. Nor has it ever been considered that censure of an attorney in court or ill feeling toward an attorney by the judge was theoretically detrimental to the interests of the client. Yet in fact these would constitute a slight bias, and in the present case there was evidence of a most bitter personal controversy between the water company officials and the judge previous to his elevation to the bench. The court relies too much on the innate integrity of a judge. and there seems to be no doubt but that a great injustice was done in not permitting a change of venue.

CONSTRUCTION OF STATUTE—STREET WORK—SECOND ASSESSMENT—EDE V. CUNEO ET AL., 58 Pac. Rep. 538 (Cal.).—Where it has been provided by statute, that whenever any suit to foreclose an assessment lien for street work has been defaulted by reason of some defect in said assessment * * * any person interested may within three months after final judgment apply to the superintendent of streets, and have another assessment issued in conformity to law. *Held*, that superintendent has no authority to make second assessment for street work when plaintiff's failure to recover on first was not by any defect in assessment, but by reason of absence of a certificate of city engineer and of a record thereof.

As the statute is of a remedial nature, it would seem where injustice would result, that even if the plaintiff were not within the very letter of the

law, but was within the meaning and object, the statute should be liberally construed. *White* v. *The Mary Ann*, 6 Cal. 462. This position was maintained by the two dissenting judges.

CORPORATIONS—LIABILITY OF DIRECTORS—ENFORCEMENT AT LAW—AMENDMENT OF COMPLAINT—MARSH V. KAYE ET AL., 60 N. Y. Sup. 439 (Supreme Court).—The membership corporation law, Section 11, makes directors "jointly and severally" liable for debts contracted while they are directors, if the action against them to recover the amount unsatisfied against the corporation be commenced within one year after return of execution unsatisfied. *Held*, that the liability is primary, and must be enforced by an action at law, not in equity, as was attempted in the present case. The complainant petitioned that the amounts which the directors were liable to pay might be ascertained and apportioned to the several debts of the plaintiff, and of such other creditors as might become entitled to share in the fruits of the action; and that the defendant creditors of the corporation, and all other persons claiming to be creditors might be enjoined from prosecuting any action at law to recover any debt due from said corporation and from collecting any judgment in any such action. The court, however, considered the relation of these directors to a creditor simply that of joint and several debtors from whom the creditor could recover the amount of his debt by an action at law, and having a remedy at law, no cause of action in equity existed which would entitle him to implead all other creditors with all the debtors who were liable to such creditors for the amount of their claims against the corporation, for the purpose of settling the total amount of such indebtedness in one action. "It is no business of the plaintiff's whether other creditors of the same debtors do or do not prosecute their claims, nor have the other creditors any interest in the recovery by the plaintiff of his claim against his debtors; and nothing alleged in this complaint would justify the court in restraining these other defendants from prosecuting their claims at law, as they have a right to do."

McLaughlin, J., dissents on the ground that the avoidance of a multiplicity of actions is one of the recognized grounds of equity jurisdiction, and that no reason can be assigned why equitable jurisdiction ought not to be sustained to enforce the liability of the directors in the case at bar, to prevent a multiplicity of actions, just as it is sustained in actions against stockholders to enforce their statutory liability, but the majority opinion points out the distinction between the two cases, as follows: "In the case of limited liability imposed upon stockholders, the Legislature created a fund which should be applied to the payment of the corporate debts, and it is apparent that to create and administer that fund, a resort to a court of equity is essential. In the case at bar no liability is imposed to create a fund for the benefit of *all creditors* of the corporation, nor would all creditors be entitled to share in the liability imposed upon the directors, but the directors are made *primarily responsible* to *each creditor* of the corporation."

The majority of the court held also that it was not error to refuse to permit amendment of the dismissal of a complaint to hold trustees of a defunct corporation liable, the effect of which would be to change the action to one for an accounting against the receiver, when the original complaint contains no allegations as to assets in the receiver's hands, and asks no relief as against him, and does not demand an accounting.

McLaughlin, J., dissented likewise from this opinion on the ground that the complaint was sufficient to enable the court to direct an accounting even without amendment. "Before the plaintiff can subject the directors to the statutory liability," he says, "he must apply towards the payment of the corporate debts all of the corporate assets. A permanent receiver having

been appointed, this can only be done by compelling him to account. Until such accounting be had, and an application be made of the proceeds of the assets held by the receiver, it is difficult to see how a recovery can be had against the directors, because until then the extent of their liability cannot be ascertained."

CORPORATIONS—SALE OF ASSETS BY ALL STOCKHOLDERS WITHOUT FORMAL ACTION—PURCHASE OF STOCK IN OTHER CORPORATIONS—ULTRA VIRES—DE LA VERGNE REFRIGERATING M. CO. v. GERMAN SAVINGS INST. ET AL., 20 Sup. Ct. Rep. 20.--A contract for purchase of stock in another company for the purpose of controlling it, unless expressly authorized, is *ultra vires* and void. *Ultra vires* is a good defense to defeat recovery upon an executed contract, although an action upon *quantum meruit* will lie for benefits received. The good will of a company belongs to the corporation, and a transfer of it by all the stockholders without formal corporate action is invalid and confers no benefit. Justices Brewer and McKenna dissenting.

This reverses two decisions of the Circuit Court of Appeals for the Eighth District (36 U. S. A. 184, 49 U. S. A. 777). Although the generally accepted rule seems to be that *ultra vires* cannot be set up by a corporation to avoid its obligation upon a contract performed by the other party (Moraw, § 689 ff.), it is well established in the Supreme Court that such defense is good. The doctrine in this court is that "a contract of a corporation which is *ultra vires* in the proper sense, that is to say, outside the object of its creation, as defined in the law of its organization * * * is wholly void and of no legal effect." "Nothing done under it, nor the action of the court can infuse any vitality into it." But the court will do justice, so far as possible, by permitting recovery on the implied contract to return or make compensation for property or money which it has no right to retain. *Central Transf. Co.* v. *Pullman*, 139 U. S. 24, 60-61.

EXEMPLARY DAMAGES—EJECTMENT OF PASSENGER—IMPLIED MALICE—COWEN ET AL. V. WINTERS, 96 Fed. 929.—A general passenger agent deliberately repudiated certain tickets that had been sold to the public. *Held*, that a bona fide purchaser of one of these tickets could recover exemplary damages for his ejectment from defendant's train.

The rule in regard to exemplary damages, as laid down in *Railroad Co.* v. *Prentice*, 147 U. S. 101-107, is now firmly established and well recognized. The present case is interesting as a recent exposition of that rule. The peculiar duties that a common carrier owes to the public makes an abuse of its civil obligations especially serious. It is this feature, the carrier's close connection with the public, that permits a court to grant the rather exceptional remedy of exemplary damages. The facts in the present case seem to justify the court in holding as it has. But any extension of rule beyond the principles laid down in *Railroad Co.* v. *Prentice* above, should be viewed with concern, especially in view of the present apparent hostility to large corporations.

DEAD BODIES—RIGHT OF WIDOW TO REMOVE HUSBAND'S REMAINS—60 N. Y. Sup. 539 (Supreme Court).—A widow freely consenting to the interment of her husband's body in a certain burying ground, is estopped from removing it. But when, at the time of his death, she was in feeble health and became nearly frantic during the time which preceded the burial, she should not be regarded as consenting that the place of burial be permanent.

It has long since been established that the right of burial is a legal right. *Foley* v. *Phelps*, 1 N. Y. App. Div. 551; *Pierce* v. *Swan Point Cemetery*, 10 R. I. 227; 14 Am. Rep. 667; *Matter of Widening Beekman St.*, 4 Bradf. (N. Y.) 503;

Renihan v. *Wright*, 125 Ind. 536, and that the surviving husband or wife, as the case may be, controls this right rather than the next of kin. *Weld* v. *Walker*, 130 Mass. 422; *Durell* v. *Hayward*, 9 Gray (Mass.) 248; *Larson* v. *Chase*, 47 Minn. 307; *Burney* v. *Children's Hospital*, 169 Mass. 57, 47 N. E. 401.

Though it is well established that after a burial, with the free consent of the person having the right to control the same, such person is estopped from removing the remains. *Fox* v. *Gordon*, 16 Phila. (Pa.) 185; *Peters* v. *Peters*, 43 N. J. Eq. 140; *Thompson* v. *Deeds*, 93 Iowa 228. Yet if the remains have been buried without such free consent, a court of equity may permit such person to remove them. *Weld* v. *Walker*, 130 Mass. 422; *Hackett* v. *Hackett*, 18 R. I. 155, 26 Atl. 42.

HOMESTEAD LIEN—BORROWED MONEY—CONTRACT—INDEBTEDNESS INCURRED AFTER HOMESTEAD RIGHT ATTACHES—JOHNSON COUNTY SAVINGS BANK v. CARROLL, 80 N. W. 683 (Iowa).—Where a creditor loans money on security, which is thereafter lost, he is not entitled to a lien on the homestead although the money loaned was used to pay part of the purchase price.

Robinson, C. J., dissenting on the ground that same gives to the defendant property which he never paid for, and holds it exempt from liability for the purchase price actually paid by another.

In *Eyster* v. *Hatheway*, 50 Ill. 521, and *Mitchell* v. *McCormick*, 50 Pac. 216, it was held that, in order to raise a lien on the homestead, it is not enough to show that the borrowed money was used to pay for the homestead, but it must also appear that it was a part of the contract that this should be done.

In *Williams* v. *Jones*, 100 Ill. 362, it was held that, although there be a waiver of the vendor's lien by taking other security for purchase money furnished, the holder of the indebtedness will not thereby lose the protection of the statute which provides that a homestead is not exempt from sale for a debt or liability incurred for the purchase or improvement thereof.

In *Christy* v. *Dyer*, 14 Iowa 438, it was held that a debt for the purchase money of premises occupied by the debtor as a homestead, is not a debt arising after the purchase of such homestead; and the homestead may, therefore, be subjected to the satisfaction of same.

INJUNCTION—LABELS—USE OF PRIVATE NAME AND LIKENESS—ATKINSON v. JOHN E. DOHERTY & CO., 80 N. W. 285 (Mich.).—Equity will not restrain the use of the name and likeness of a deceased person as a label to be used in the sale of cigars named after him, though he may not have been a public character, so long as it does not amount to a libel.

This case has aroused wide-spread comment throughout the country, as deciding that there is no law in Michigan against bad taste, and involves a discussion of the law in regard to the so-called "right to privacy." How much property right has a person in his name and portrait?

In *Schuyler* v. *Curtis*, 19 N. Y. Sup. 264, 64 Hun. 594, the Supreme Court held that a preliminary injunction would be at the instance of the relatives of a deceased woman to prevent her statue from being exhibited at the World's Fair, and designated "The Typical Philanthropist." The case was afterwards heard and a decree entered in accordance with the prayer of the bill. *Schuyler* v. *Curtis* (Sup. 124 N. Y. Sup. 509). This decision was squarely in conflict with the doctrine laid down in present case, but was reversed by the Court of Appeals in 1895. See 42 N. E. 22, Gray, J., dissenting, the opinion holding that "a woman's right of privacy, in so far as it includes the right to prevent the public from making pictures and statues of her, does not survive her, so that it can be enforced by her relatives." In *Marks* v. *Jaffa*, 26 N. Y. Sup. 908, publication of portrait was enjoined apparently on the strength of *Schuyler* v. *Curtis*, not then reversed.

Corliss v. *Walker*, 31 Lawy. Rep. Ann. 283, and note (S. C. 57 Fed. 434, and 64 Fed. 280), denied an injunction to restrain the publication of a biography of the great inventor, but granted it to restrain the publication of his portrait. Subsequently this injunction was dissolved, on the ground that the deceased was a public character, not a private individual. In the case under discussion the court in commenting on the Corliss case questions the wisdom of the distinction, and says: "We are loath to believe that the man who makes himself useful to mankind surrenders any right of privacy thereby."

In *Murray* v. *Engraving Co.*, 28 N. Y. Sup. 271, it was held that a father could not prevent the unauthorized publication of his child's photograph, for the law takes no cognizance of a sentimental injury independent of a wrong to person or property.

There are many authorities to the effect that a private individual has a right to be protected in the representation of his portrait in any form, and that this is a property as well as a personal right. Cf. *Gee* v. *Pritchard*, 2 Swanst. 402; *Folsom* v. *Marsh*, 2 Story 100, Fed. Cas. No. 4901; *Tipping* v. *Clarke*, 2 Hare 383, 393; *Prince Albert* v. *Strange*, 1 Mach and G. 25. But the court in the present case decides that the alleged right to privacy is not under this particular state of facts a property right, and that so long as the publication of the portrait does not amount to a libel, a court of equity will not protect the relatives of the deceased against a mere injury to their feelings, although a violation of the canons of good taste. "The law," says the court, "does not discriminate between persons who are sensitive and those who are not."

INSOLVENT CORPORATIONS—SECRET PREFERENCE OF CREDITORS—UNITED STATES RUBBER CO. ET AL. V. AMERICAN OAK LEATHER CO., 96 Fed. 841.—Where a corporation that is about to fail, in order to gain time and borrow money, makes an arrangement with some of its creditors whereby they are to be put in charge of the concern and be given judgment notes covering what is due them and thereby are to prevent preferences to other creditors, such an arrangement is a fraud in fact on the general creditors.

Courts have recognized the justice of allowing embarrassed concerns to tide over difficulties by using their property in any way they may see fit. *Preston* v. *Spaulding*, 125 Ill. 20; *White* v. *Cotzhausen*, 129 U. S. 329. But they have further recognized that one cannot convey all his property and stop doing business. *Kelloy* v. *Richardson*, 19 Fed. 70, 72. It then becomes a question of what was the intention of the insolvent concern in entering into obligations like those in the present case. How close a question this often is, is well illustrated by the case before us. We see how frequently the judicial mind may differ on this point, and in view of the large interests that may be concerned in such case, how important it is that a transaction should be considered as actually fraudulent only on the strongest proof or actual knowledge. *Street* v. *Bank*, 147 U. S. 36.

INSURANCE—AGENT—AUTHORITY — NOTICE — POLICY — ENDORSEMENT —WARRANTY—NORTHRUP ET AL. V. PIZA, 60 N. Y. Supp. 363.—A fire insurance policy was issued by general agents and attorneys of a fire insurance company on recommendation of a firm of fire insurance brokers, said policy containing material warranty on the part of the insured. Subsequently an addition was made to the policy in which no mention was made of the warranty. *Held*, that a broker having only authority to solicit risks, recommend same, and receive premiums (these services being paid for by commissions), is not an agent of the insuring company, and hence notice to him is not notice to the company. Also that attachment of said endorsement, see supra, did not abrogate original warranty clause.

The defense in the original action rested on the ground that no notice had been given of the falsity of a material warranty in the original policy as to the existence of certain division walls, and that the waiver of the warranty by the insurance brokers was ultra vires. Particular importance is given to the prevailing doctrine that insurance brokers are not agents, the leading case mentioned being *Allen* v. *Insurance Co.*, 123 N. Y. 6. The many cases contra are not now considered of authority. The court argues that the endorsement, containing no mention of the warranty, but reiterating the original policy in other respects, and subsequently added to the policy, was not a waiver, because not conflicting with original form of policy. It is clear that this is not the real reason, for the endorsement did not act as a waiver, because it was added (according to the evidence) by the brokers, who were not agents, and therefore had no authority to waive a warranty. The dissenting opinion is a most thorough demonstration of the possibility of waiver by such an endorsement, but does not even allude to the possible lack of authority on part of the brokers. This disregard of the vital question makes the dissenting opinion of no weight whatever. The brokers were not agents, had no authority to waive conditions, and notice to them was not notice to the company or its agents. *Smith* v. *Farmers' Mut. F. Ins. Co.*, 19 Ohio St. 287; *Devens* v. *Mechanics, etc., Ins. Co.*, 83 N. Y. 168.

MUNICIPAL BONDS—DEMAND—PRIORITIES—MEYER V. WIDBER, TREASURER (Bohen, Intervener), 58 Pac. Rep. 532 (Cal.).—*Held*, that where under statute damages to abutting property owners are to be paid only in bonds, it is no defense to a mandamus compelling payment of a bond, that other bondholders had made prior demands, which had been refused for lack of funds. Beatty, C. J., Temple, J., and Henshaw, J., dissenting.

The decision of the court is without doubt correct. The demand upon the treasurer, when he had funds applicable for the purpose, gives the parties demanding, upon refusal of their demand, the right to a mandamus. *Meyer* v. *Porter*, 65 Cal. 67. The fact that the intervener neglected to follow up his demand by an action would not give him a preferred claim over one who made a subsequent demand and chose to enforce his right. It has been held that a judgment creditor of a county who had received a warrant on the treasurer, which was refused payment, might have mandamus to enforce collection of a tax to pay such judgment, and that he is not bound to wait and take his turn among other warrant holders. 2 *Cent. Law Journal* 771.

The chief justice, who dissents, contends that the intervener should be given priority in payment, for, having made a prior demand, the treasurer was legally obliged to make payment, unless the intervener had forfeited his rights. Furthermore, that it was the duty of the appellant to show that when he commenced his proceeding, that those who had made prior demands had lost their right of action. This the appellant failed to do. The contention is also made that if the doctrine of this case is carried to its logical conclusion, the custodian of a fund in the position of the defendant may pay or refuse those who make demands, irrespectively, unless sued, or he may refuse all until some favored claimant serves him with a writ of mandamus. The judge, however, fails to cite any authorities in support of this reasoning.

MUNICIPAL CORPORATIONS—ORDINANCES—HACK STANDS IN STREETS ADJACENT TO RAILWAY DEPOTS—PENNSYLVANIA CO. V. CHICAGO, 54 N. E. 825.—The Union Depot, leased by the Pennsylvania Company and used by several different railways, fronts on Canal street, between Madison and Van Buren. All through tickets of lines using this depot bear coupons for conveyance through the city of Chicago from this station to the station of the connecting line, and each railway company has a contract for the use of a line of coaches for the performance of this service. A portion of the rail-

roads' own ground is used by the vehicles of this line of coaches, from whence they may be called by electric bells to the different exits from the depot. The city of Chicago by ordinance established the east side of Canal street, between Adams and Madison, as a place where hacks were permitted to stand. The Railway Company brought a bill, praying for an injunction restraining the city from continuing the stand for hacks, on the ground of irreparable injury by reason of interference, interruption and daily inconvenience to the complainants, amounting to an interference with their private rights, and causing an unjust burden upon their property without compensation. And, further, that it gives for private use a portion of Canal street, which is held by the city in trust solely for use as a public street. *Held*, the ordinance is a reasonable and valid exercise of the powers conferred upon the Common Council of the city of Chicago. Decree of lower court dismissing bill affirmed.

The doctrine of the court is that a railroad is a quasi-public corporation, and a railroad depot a public building. The special easement of the abutting owner in the case of a building used for public purposes, though privately owned, inheres in the city as trustee for the public. That it may, as a benefit to the public, and to prevent the railroad company from monopolizing the business of transfer, permit hack stands at such places. Cf. *Railroad Co.* v. *Langlois*, 9 Mont. 419; *Railroad* v. *Tripp*, 147 Mass. 43; *Marriott* v. *Railway*, 1 C. B. (N. S.) 499; *McConnell* v. *Pedigo*, 92 Ky. 465; *State* v. *Reed*, 24 Lou. 308 (Miss.).

Cartwright, C. J., dissents. The occupation of a street as a place for the owners of hacks, carriages, and express wagons to keep them while waiting for employment in the carriage of persons or property, is a purely private use. It is of the same nature as the occupation of premises as a stable yard. *Rex* v. *Cross*, 3 Camp. 224; *Branahan* v. *Hotel Co.*, 39 Ohio St. 333; *McCaffrey* v. *Smith*, 41 Hun. 117. Such a use is a perversion and violation of the trust on which the city holds the streets. 2 *Dill. Mun. Corp.* § 660; *Com.* v. *Passmore*, 1 Serg. and Rawle 217; *Lockwood* v. *Railroad Co.*, 122 Mo. 86. Injunction is a proper remedy. *High Injunctions*, 3d Ed. § 816; *Hill. Inj.*, 273; *Greene* v. *Oakes*, 17 Ill. 249.

MUNICIPAL CORPORATIONS—RIPARIAN OWNERS—POLLUTION OF WATER COURSES BY SEWAGE—INJUNCTION—CITY OF VALPARAISO V. HAGEN, 54 N. E. 1062 (Ind.).—The sewage system of Valparaiso, a city of 8,000 inhabitants, discharges 47,000 gallons of sewage daily into a marsh that drains into Salt Creek. The city further arranged for a direct outlet by the extension of its main sewer through the marsh to Salt Creek. Ninteen owners of lower lands abutting on this stream brought a bill praying that the city be enjoined forever from constructing said sewer outlet, or emptying the sewage of the city into said stream. Upon error for demurrer, overruled, *held*, failure to aver the absence of skill or want of due care, or that some other outlet could more reasonably be had, or that some other reasonable method of disposing of city sewage is available, is a fatal defect and the demurrer should be sustained.

The right of the riparian owner is not absolute, but a natural one, qualified and limited like all natural rights by the existence of like rights in others. His enjoyment is prior to those below him and subsequent to those above. *Merrifield* v. *Worcester*, 110 Mass. 218. The city of Valparaiso is an upper riparian owner. As such it has rights to the use of Salt Creek, though these rights are correlative with those of other riparian owners on the same stream. *Bassett* v. *Salisbury Mfg. Co.*, 43 N. H. 569. Any damage resulting from acts of the city in a reasonable exercise of these rights would be *damnum absque injuria*. It must be presumed that public officers will perform their duties reasonably and with due care, therefore, injunction will not lie.

PARTNERSHIP—CONTINUANCE OF BUSINESS WITH CONSENT OF EXECUTRIX—WHAT IS FIRM PROPERTY—REAL ESTATE—DEXTER V. DEXTER ET AL., 60 N. Y. Sup. 371.—Father and son were co-partners in business and tenants in common in certain real estate. On the death of father, said son and a second son became co-partners in same business, each making certain conveyances of real estate to the other, in order to equalize their partnership interests and their separate interests in real estate left by their father. First son died, and, with consent of his executrix, the survivor carried on business until failure took place. *Held*, death of partner ends partnership and power to carry on partnership business; sanction of continuance of business by executrix of deceased partner renders said executrix a creditor of surviving partner of equal grade with other creditors, to the amount of the value of whatever interest in firm that is lost by him; real estate inherited by co-partners is not firm property, if merely occupied and not otherwise used.

The prevailing opinion holds that in the absence of express provisions in will of deceased partner, or in articles of partnership, the partnership is dissolved, and that if surviving partner continues business with consent of executrix of deceased partner, he does so as an individual, and all debts contracted by him in the conduct of the business or by the borrowing of money are due from him as an individual, for reason that he conducts the business as an individual, as a surviving partner, in whom the entire title to the partnership property is vested. There seem to be several faults in this reasoning. First, it is generally considered that a business may be continued with consent of representatives of deceased partner, and even if in line with some decisions, a business so continued is considered a new partnership (Parsons on Partnership, Sect. 343), the liability of the surviving partner is not individual, but is that of a co-partner. Secondly, the title of a surviving partner is complete only for purpose of liquidating the affairs of the firm. The doctrine of the dissenting opinion seems the better one. that the claim of the executrix and devisee of the deceased partner was subordinated to the claims of the creditors of the continued business. and that an individual creditor would be subordinated to both executrix and creditors of continued business. A curious statement exists at the close of the prevailing opinion, to the effect that an individual creditor of the surviving partner would take precedence of the rights of the receiver. This is without any support of principle or authority. Because certain land was merely occupied by co-partnership, but not otherwise used, and not purchased with partnership assets, it was held not to be partnership property. The best rule is clearly this: that land improvements and taxes upon which were paid out of partnership assets, and which was regarded as firm property, is firm property. *Fairchild* v. *Fairchild*, 64 N. Y. 471; *Ross* v. *Eldred*, 73 Cal. 394.

PERSONAL INJURIES—ADMISSIBILITY OF EXPERT TESTIMONY—CROUSE V. CHICAGO & N. W. RY. CO., 80 N. W. 752 (Wis.).—In an action for personal injuries, *held*, that it is error to permit testimony that the plaintiff would require medical attention in the future and to what extent. Dodge and Winslow, JJ., dissenting.

The advancement of the sciences and the progress of research in special fields of knowledge have made expert testimony of large importance during the present century. The basis of its admission is the fact that there are certain processes of reasoning which an ordinary jury is incapable of performing, even with the assistance of courts and juries. Hence, the general rule is that experts may give their opinions upon questions of science, skill, or trade, or others of the like kind, or when the subject matter of injury is such that unexperienced persons are unlikely to prove capable of forming a correct judgment upon it without such assistance, or when it so far partakes of the nature of a science as to require a course of previous habit or study, in order to the attainment of a knowledge of it; and the opinion of

experts are not admissible when the inquiry is into the subject matter, the nature of which is not such as to require any peculiar habits or study in order to qualify a man to understand it. *Jones* v. *Tucker*, 41 N. H. 546; *New England Glass Co.* v. *Lowell*, 7 Cush. 319; *Graham* v. *Pann Co.*, 139 Pa. St. 149.

In the present case the doctor was allowed to testify that the plaintiff was rendered a helpless paralytic by the injury and that such condition is likely to be permanent. This seems to be in accordance with the general rule, that an expert can testify as to the effect, nature, and extent of personal injuries, and what are the probable results that would follow from an injury. *Albert* v. *N. Y. L. E. W. R. Co.*, 118 N. Y. 77; *Fiber* v. *N. Y. Central R. Co.*, 49 N. Y. 42; *Rowell* v. *City of Lowell*, 11 Gray, 420; *Evansville & T. H. R. Co.* v. *Crest*, 116 Ind. 446; *Louisville N. A. & C. R. Co.* v. *Wood*, 113 Ind. 54.

In *Fiber* v. *New York Central R. R. Co.*, Allen, J., in the opinion of the court says there is no evidence other than that of experts by which courts and juries can determine whether a disease or an injury has been or can be permanently cured or what its effect will be upon the health and capability of the injured person in the future.

In *Albert* v. *N. Y. L. E. W. R. Co.*, the witness was asked to state length of time plaintiff might live in the natural course of events, and it was held to be no error.

Thus it would seem to follow as a natural consequence that testimony that plaintiff would require medical attention and nursing in the future, and to what extent, would be admissible, but the court excluded it upon the somewhat inconceivable ground that such evidence entered the domain of *common knowledge*, and that the jury were as able to arrive at that conclusion without the aid of his opinion as with it. In the course of the opinion of the court, Bardeem, J., remarks: "There are experts and experts, and many of them testify like retained witnesses, and that very much of such testimony is of little more value than an intelligent guess," but we are unable to see how that which simply affects the credibility of a witness can bar the admissibility of his testimony. The rules affecting credibility of witnesses and admissibility of evidence are separate and distinct.

One of the objections to the admissibility of the testimony is, says the learned judge, that its tendency was to increase the damages and swell a recovery. But what could be more reasonable for to quote from a prior part of the opinion, "it is sufficient if the damage claimed legitimately flows directly from the negligent act, whether such damage might be foreseen by the wrong doer or not."

In a dissenting opinion, Dodge, J., says that while "the testimony may approach the field of common knowledge, from which expert testimony should be carefully excluded, it does not prejudicially cross the line." The present case was one of severe spinal injury and disordered nervous system, with which the ordinary juror is strangely unfamiliar, and in which the opinion of a physician would be very valuable, while a non-professional would be totally at sea. In short, the testimony in reality did not invade the ground of common knowledge, but merely invoked the peculiar knowledge and opinion of a medical expert, and for this reason should have been held admissible.

PUBLIC LANDS—MEXICAN GRANTS—RIGHTS OF INDIANS—HARVEY ET AL. V. BARKER ET AL., 58 Pac. Rep. 692 (Cal.).—Defendants, Mission Indians, claimed a prescriptive title to certain lands included within the boundaries of a Mexican grant, which grant was confirmed by the United States and a patent thereto issued to plaintiff's grantor. Defendants did not present their claim to the land commissioners for confirmation, as provided under Act Cong., March 3, 1851. Plaintiff took the land subject to the condition that he should not interfere with roads, cross roads and other usages (servidumbres). *Held*, that said grant was not subject to any right or interest in the defendants, and that no trust relation existed between the grantor and defendants.

The decision is by an evenly divided court. The dissenting judges seem to adopt the better line of reasoning, which is borne out by a long line of decisions. *Teschemacher et al.* v. *Thompson et al.*, 18 Cal. 11. When Mexico gained her independence it was declared that all inhabitants, including Indians, should be considered citizens, and that the property of every citizen should be respected and protected. *Treaty of Guadalupe Hidalgo.* Mexicans who, previous to the acquisition of California by the United States, had acquired title to lands from that government, and who chose to remain, held such title and were protected the same as if no change in sovereignty had occurred. *Phelan et al.* v. *Poyoreno et al.*, 74 Cal. 448.

The defendants relied upon *Byrne* v. *Alas*, 74 Cal. 628, which is an almost parallel case. Here, as in the case under consideration, the appellants failed to present their claim to the land commissioners. The court held that it was not necessary, and that they were not even charged with knowing that there was such a commission.

C. J., Beatty, who dissented, pointed out that the only difference in the case under review and *Byrne* v. *Alas* was that there was no provision quoted, that the plaintiff took the land subject that he should in no way disturb nor molest the Indians who were living thereon. But he calls attention to the fact that the plaintiff should not interfere with roads or other "servidumbres," and that the word "servidumbres" had a meaning in Spanish law broad enough to include the right of occupancy claimed by the defendants.

In addition to the above, another of the dissenting judges contended that the defendants would still have had the right to occupy the land had there been no express reservation, for the Indians being mere wards of the nation, it is to be presumed that the nation has always recognized and protected their customary rights, and that all grants are made with the understanding that grantees know those rights, and take subject to them.

RAILROADS—INJURY TO ADJOINING LAND—SYRACUSE SOLAR-SALT CO. V. ROME, W. & O. R. R. CO., 60 N. Y. Sup. 40.—Where a railroad company operated under statute and municipal license its track upon a city street, and thereby cart such dirt, cinders and soot upon the plaintiff's premises adjoining, as to cause him great damage in the prosecution of his business, the manufacture of salt, diminishing its quantity, quality and value. *Held*, that the plaintiff was entitled to compensation.

The defendant in this case relied, with apparent reason, on the case of *Forbes* v. *Railroad Co.*, 121 N. Y. 505. It was held in that case that a railroad operating its road under proper authority upon a city street, took no adjoining property and was not liable to the owner of such property for any consequential damages resulting from a natural use of the road for railroad purposes.

But that decision is now limited by this case, the court saying that it is a "very broad statement of the rule and must be taken with some qualification."

The Legislature may authorize a small nuisance, but where it greatly exceeds the nature of an inconvenience and causes great damage, compensation must be allowed.

The court holds that this case presents the fact of a taking of plaintiff's property, because proprietary rights must be considered here as valuable property. *Arimond* v. *Green Bay, etc., Co.*, 31 Wis. 316, 335. Such use is an easement on the plaintiff's property. 2 *Washburn on Real Property*, 4th Ed. 299; *Long Island R. R. Co.* v. *Garvey*, 159 N. Y. 338.

SALE OF LIQUOR BY DRUGGIST—TOWN ORDINANCE—PEOPLE V. BRAISTED, 58 Pac. Rep. 796 (Colo.).—A town attorney furnished a person with money to purchase liquor from a druggist who had no permit. By such a sale the druggist would violate a town ordinance. *Held*, that the town could not recover a penalty for a violation of its ordinance instigated and procured by its officer.

Although there are few cases involving this principle, the decision seems to be correct. It was held, in *Love* v. *People*, 160 Ill. 501, where a detective by a previously arranged plan with the owner of a building induced certain persons to enter the building and take money from a safe, with the sole intent of entrapping them, that they could not be convicted of crime. In his opinion on the case under consideration, the judge relies on *Ford* v. *City of Denver*, 10 Colo. App. 500, where it was held public policy will not permit a municipality to derive profit from unlawful acts which are deliberately instigated by its officers. To hold that a town attorney can involve a person in a violation of an ordinance, that he may pursue him for a penalty would seem a most pernicious doctrine.

STATE APPROPRIATION TO NORMAL UNIVERSITY—CONSTITUTIONALITY—BOEHM V. HERTZ, 54 N. E. 973 (Illinois).—The Constitution of Illinois provides: "The State shall never pay, assume or become responsible for the debts or liabilities of, or in any manner give, loan or extend its credit to or in aid of, any public or other corporation, association or individual." The Legislature passed an act making an appropriation "for the ordinary and other expenses of Illinois State Normal University and for the completion and equipment of its gymnasium building." One Boehm, a taxpayer, brought a bill praying for an injunction restraining Hertz, the State treasurer, from paying any money appropriated under the act. *Held*, act constitutional, bill dismissed.

The corporation was in existence prior to the adoption of the Constitution and had received the interest of a fund called the College and University Fund, provided for in the act for the admission of the territory of Illinois as a State. Any subsequent limitation of its powers to do so must be found expressed or arising by necessary implication in the Constitution. They are not so found, and the corporation may receive. May the State give? The Constitution also provides that "The General Assembly shall provide a thorough and efficient system of free schools." There is no limitation in the Constitution as to the agencies the State shall adopt in providing this system of free schools. *Speight* v. *People*, 87 Ill. 600. Normal schools are public institutions which the State has a right to establish and maintain for the purpose of carrying out the policy of the State with reference to free schools. *Burr* v. *City of Carbondale*, 76 Ill. 455.

SET OFF—JUDGMENT—GROUNDS OF OBJECTION—BACON V. REICH, 80 N. W. 278 (Mich.).—One being sued on a contract which he made with a corporation, since insolvent, by one to whom the corporation had assigned the claim, can set off a judgment obtained by him against the corporation, for a breach of the contract, in proceedings instituted by him subsequent to the assignment by the corporation of the claim against him, where he had no knowledge of the assignment when he took his judgment.

That a claim becomes merged in the judgment is elementary. According to the more recent cases this principle is supported on the grounds that the allowance of a new suit is a superfluous and vexatious encouragement to litigation. injurious to the defendant, and of no benefit to the plaintiff. 15 *Am. & Eng. Enc. Law*, 339, and cases cited. This doctrine, however, if vigorously applied, may work hardship and injustice, and it seems to be lawful to disregard it in some cases. *Wilson* v. *Tunstall*, 6 Tex. 221; *Wood* v. *Gamble*, 11 Cush. 8; *Railroad Company* v. *McHenry*, 17 Fed. 414; *Ferrall* v. *Bradford*, 2 Fla. 508; *Clark* v. *Rowling*, 3 N. Y. 216; *Stevens* v. *Damon*, 29 Vt. 521; *Cramer* v. *Manufacturing Co.*, 93 Fed. 636; *Fox* v. *Althorp*, 40 Ohio St. 32.

STREET RAILWAY—LICENSE—RECEIVERS—IMPROVEMENT OF MORTGAGED PROPERTY—ROCHESTER TRUST AND SAFE DEPOSIT CO. V. ROCHESTER AND I. R. CO. ET AL., 60 N. Y. Sup. 409 (Supreme Ct.).—An electric railway

passed under the right of way of a steam railroad, under an agreement that on sixty-days' notice it would erect permanent undercrossings of substantial masonry. After the electric road had passed into the hands of a receiver, the railroad served the sixty-days' notice. The court *held* that the permission to cross the right of way was a mere license which the railroad could revoke at any time, and, since the railroad had not been made a party, the court would not authorize the receiver to issue certificates to erect the permanent improvements, but would leave the purchaser at the receiver's sale to assume the responsibility of making them.

Two important questions are here discussed. The court decided that the electric road had a mere license, and no easement in the property of the steam railroad, since no grant had been made by deed, without which no easement can exist. Cf. *White* v. *Railway Co.*, 139 N. Y. 24, 34 N. E. 887. This being so, would the construction by the electric railway company of the permanent undercrossings create an equitable estoppel which would operate to prevent a revocation of the license, on the ground that the licensee had entered upon the land of the licensor and expended thereon labor and money upon the faith of the license? The court deemed it unnecessary to answer this question, since the steam railroad had not been made a party to the action and would not be bound by any decision affecting its rights in the undercrossings, but cited with apparent approval *White* v. *Railroad Co.*, supra, which decided that no equitable estoppel would arise under such circumstances, "because it must be held that the licensee knew that the license gave him no interest in the land, and that he must rely upon the indulgence of the licenser, and if that be withdrawn, he must himself withdraw from the land; otherwise, it is said, the statute in regard to the creation and conveyance of interests in land would be in great part abrogated."

The second question discussed is the right of a receiver to issue certificates in payment for permanent improvements to the road, thus creating a lien on the property prior to that of the mortgagees. The court held that the purpose for which receiver's certificates may be issued is usually confined to *making necessary repairs* and *protecting the property as it is*. The propriety of every expenditure is to be judged by the necessity of making it in order to preserve the value of the property in the hands of the receiver. The generally recognized rule is that the original construction creditors have no superior equity. In *Wood* v. *Deposit Co.*, 128 O. S. 416. 9 Sup. Ct. 131, it was held that the doctrine of *Fosdick* v. *Schall*, 99 O. S. 235. applied to *operating expenses only*, and *not to a contract in the ordinary construction of the road*. Applying these doctrines to the case at bar, the court decides "that it has no power to impair the obligations of a mortgage contract by creating a prior lien, without the mortgagee's consent, unless it be in the exercise of an equitable power to preserve and protect the property, and that it has no power through its receiver to complete unfinished work or to erect new bridges or undercrossings under a pre-existing contract, beyond what is necessary for the preservation of the property of the corporation."

TRADES UNIONS—REFUSAL TO WORK WITH MEMBERS OF OTHER UNIONS—REFORM CLUB OF MASONS AND PLASTERERS, KNIGHTS OF LABOR OF CITY OF NEW YORK ET AL. v. LABORERS' UNION PROTECTIVE SOCIETY ET AL., 60 N. Y. Sup. 388 (Supreme Court, Special Term, New York County).—Motion to continue a preliminary injunction obtained against defendants, on the ground that the defendant's members refused to work with members of the plaintiff association, under circumstances where the natural effect of the expressed refusal would be to cause the dismissal of the latter class.

The court denied the motion and vacated the preliminary injunction, holding that such refusal of the defendants did not amount to a conspiracy to prevent an employment of the plaintiffs *under all circumstances*, and in the absence of instances of intimidation or of false statements as to the character of the laborers affected, the case disclosed nothing unlawful in the attitude of the defendants.

The court seems to infer that had the facts disclosed a conspiracy to prevent an employment of the plaintiffs *under all circumstances*, a permanent injunction would have been granted. Yet, if the defendants had sought to prevent all employment of plaintiffs, but had done nothing else to accomplish this purpose except refusing to work with them and inducing other workmen to likewise refuse, it is hard to see how this would have been an unlawful conspiracy. Certainly it would not if the leading English authorities are to be followed, for *Mogul S. S. Co.* v. *McGregor*, L. R., 1892, App. Cases 25, decides that the mere fact of *combination* does not make an act unlawful, and *Allen* v. *Flood*, L. R., 1898, App. Case 1, holds that a malicious purpose does not make an act unlawful, if the act in itself be legal. The act of refusing to work with other men is perfectly lawful in itself, even though there be behind it the malicious intent to prevent all employment whatsoever. It is persecution, but persecution by lawful means, which cannot be reached at law, according to the English doctrine, unless the unlawful element of intimidation appear.

In this case the plaintiffs asserted that intimidation could be inferred from the dismissal, and cited *Coons* v. *Chrystie*, 53 N. Y. Sup. 668, to support them, but the court held that case to have no application to the present facts. "In that case the suit was by the employer of laborers, whose business was damaged by the defendant union's acts in prohibiting its members from continuing their work; and it was held that the *coercion of the laborers by the union was apparent and sufficient* to sustain an action by the employer. In the case at bar, the *willingness of defendant's members to obey its orders is not placed in question*, and the effect of the defendant's acts upon the employers of the members of plaintiff association does not amount to unlawful coercion under the authorities.

For an extension of the doctrine of intimidation, see *Boutwell* v. *Marr*, 42 Atlan. Rep. 607 (Vt.), which holds that any association which obtains unanimous consent from its members to its action by means of a coercive penalty or by-law. is founded upon coercion, and that the united action of the association obtained by this coercive means is equivalent to actual intimidation employed by an unorganized body of men. An application of this doctrine to labor unions, some of which certainly make use of such a coercive penalty to obtain unanimity, might well supply the element of intimidation not apparent on the face of such proceedings as those discussed in this case.