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ADVERSE POSSESSION—RAILROAD RIGHT OF WAY.—Defendant, by deed, acquired title to a right of way, fifty feet wide and fenced within four feet of the line. Plaintiff owned the adjoining tract and more than ten years before this action was brought, planted fruit trees up to the fence. *Held,* the Statute of Limitations did not run against defendant as to the four foot strip. *Beyer* v. *Chicago, R. I. & P. R. Co.,* (Ia. 1918), 169 N. W. 651.

The majority, recognizing the conflict in the decisions in other states, purports to decide in accordance with the weight of authority in Iowa, notably the case of *Barlow* v. *C. R. I. & P. R. Co.,* 29 Ia. 276 and also *Slocumb* v. *C. B. & Q. R. Co.,* 57 Ia. 675. It erroneously cites the *Barlow Case, supra,* as authority for the proposition "that the Statute of Limitations does not apply where the easement was acquired by deed." In that case Barlow conveyed, to the defendant's grantors by deed, subject to reversion, etc., the right of way, at the time under cultivation. Later he conveyed to plaintiff who had notice of the Company's claim and used the tract as had his predecessor. *Held,* that the Railway did not lose its right by nonuser. The Court says, "if the easement has been acquired by deed, no length of time of mere nonuser will operate to impair or defeat the right * * * In this case there was no use of the premises *adverse* to the Defendant's right." No reference is made to conveyances by deed as exempt from the operation of the Statute. The plaintiff, having taken with notice, had by no overt act in change of use or otherwise, shown any intention to claim more than his grantor who held subject to the right of way. In this, it differs from the instant case where the Railway Company put up the fence and plaintiff and her predecessors, none of whom appear to have been the grantors of the Railway Company, cultivated the land up to it. The difference in facts would easily warrant an assumption of acquiescence in the boundary line or adverse possession in the instant case, while not in the *Barlow Case.* In *Slocumb* v. *Railway Co., supra,* plaintiff's deed read "subject to any right of way" the Railway might own over the land. In *Ry. Co.* v. *Hanken,* 140 Ia. 372, it was held that the platting of depot grounds had not fixed its boundaries which would then be determined by the location of the fence. In *Ry. Co.* v. *Homan,* 151 Ia. 404, it was a question of how much of the land had been accepted by the Railway. In *Helmick* v. *Ry. Co.,* 174 Ia. 558, it was held that a railway company by acquiescence in a fixed boundary line would be concluded thereby. None of these cases deny the right to acquire right of way lands by adverse possession. On analogy of the facts, the present case might better have been decided on the authority of the *Helmick Case* rather than on that of the *Barlow Case.* The authorities in other jurisdictions are in conflict. Some courts take the view that a railroad, enjoying the right of eminent domain, is quasi-public and it is, therefore, contrary to public policy to subject it to the burden of adverse possession. *Southern Pac. Co.* v. *Hyatt,* 132 Cal. 240; *Conwell* v. *Phil. & R. R. Co.* 241 Pa. 172; *McLucas* v. *St. Joseph & G. I. K. Co.,* 67 Neb. 603. In

jurisdictions where the matter has been left with the courts independent of statute, the weight of authority is decidedly in favor of the right. *Chicago, etc. R. Co.* v. *Abbot,* 215 Ill. 416; *Northern Pac. R. Co.* v. *Townsend,* 84 Minn. 152: see also 2 Va. L. Rev. 599. In Vermont, New Hampshire, Massachusetts, North Carolina and Nebraska, statutes or other constitutional provisions have declared railroads exempt from such burden.

BAILMENTS—LIEN OF BAILEE.—Three late cases throw light on recent developments in the law of lien. *The Gulfport,* 250 Fed. 577, holding that a bailee who has performed services on a chattel does not lose his lien if he loses possession of the chattel through the act of God, and *Crucible Steel Co.* v. *Polack Tyre & Rubber Co.* (N. J. 1918) 104 Atl. 324 and *Hiner* v. *Bitts* (Oreg. 1918) 175 Pac. 133, both upholding statutory liens on chattels, notwithstanding the bailee had parted with possession. The favor with which the law regarded the special lien has been well set forth by Gibson, C. J. in *Steinman* v. *Wilkins,* 7 W. & S. 466, and by Bronson, J., in *Grinnell* v. *Cook,* 3 Hill 485. The limitations on the value of this right are well brought out by Shaw, C. J., in *Doane* v. *Russell,* 3 Gray 382. These restrictions have prevented the common law lien from keeping pace with the needs of a changing world, and as the courts, which had let in the lien without the aid of statutes, refused to remove these restrictions in the same way, the recent development of the lien as a remedial instrument in the hand of the bailee has had to depend upon statutes.

The chief defects in the remedy of the lien were in the want of a power of sale and in the loss of lien by loss of possession. Possession is the life of the lien and a lien cannot survive possession, said Ryan, C. J. in *Sensenbrenner* v. *Matthews,* 48 Wis. 250. But in these days much beneficial labor is performed on property or chattels of a kind, or under circumstances, not permitting the bailee to have or to keep possession. Hence the statutory lien on a house in favor of the builder and the material man. Hence, also, the statutory lien on the donkey engine in the Oregon case, *supra,* for all the work done on the engine at various times under one contract, and in the New Jersey case, *supra,* the garageman's lien on the automobile for the price of the tires he had put on the machine. In this case the court held the statute not unconstitutional as depriving of his property without due process of law a third party who in ignorance of the lien had purchased it. Doubtless a statute might be so framed as to do so, but this merely extended the common-law lien so as to enable a bailee to retake property which has gone out of his possession and enforce his lien upon it. Donkey engines and automobiles and gasoline and many other things that are repaired or furnished these days did not exist at common law, and do not take kindly to the possession requirement. The lien must keep pace with progress.

BANKRUPTCY—ASSIGNMENT OF WAGES UNAFFECTED BY DISCHARGE.—In a suit to reform an assignment of wages to be earned in the future given by an employe of defendant to complainant to secure a note for borrowed money, it was contended that a discharge in bankruptcy granted to the assignor, in a

proceeding initiated after the assignment and loan, had rendered the assignment thereafter ineffective. *Held,* the assignment was not rendered unenforceable by the discharge, the lien created by such transaction survives the bankruptcy proceeding. *Monarch Discount Co.* v. *Chesapeake & O. Ry Co.,* (Ill., 1918) 120 N. E. 743.

In its conclusion the court is supported by an earlier Illinois case, *Mallin* v. *Wenham,* 209 Ill. 252, and *Citizens Loan Ass'n* v. *Boston & Maine R. Co.,* 196 Mass. 528, 14 L. R. A. (N. S.) 1025. In *Leitch* v. *Northern Pacific Railway Co.,* 95 Minn. 35, it was held that the assignment of wages to be earned created no lien, therefore there was nothing to survive the discharge of the principal obligation. In *Levi* v. *Loevenhart & Co.,* 138 Ky. 133, an order by an employee by his employer to pay out of his wages each week a certain sum to a creditor was held valid only "so long as the indebtedness to plaintiff remained unsatisfied," and that since the debt upon which the payments were to apply was discharged by the employee's discharge in bankruptcy the order had spent its force at that time. Discharge in bankruptcy was deemed equivalent to payment. In several cases District Courts have held such wages earned after the bankruptcy were released from all claim by the assignee, the usual ground for the conclusion being that until the wages were earned there could be no lien, hence none was preserved. *In re West,* 128 Fed. 205; *In re Home Discount Co.,* 147 Fed. 538; *In re Karns,* 148 Fed. 143; *In re Ludeke,* 171 Fed. 292; *In re Lineberry,* 183 Fed. 338.

CONTRACTS—THIRD PARTY BENEFICIARY.—Upon a promise by defendant's testate to make a certain provision in his will for his wife's niece the wife signed a will in which the bulk of her property, a house and lot, was devised to the promisor for life, remainder over to a certain society. The promisor died without having made any provision as agreed upon, and the niece brought suit on the promise, claiming in damages the value of the house which her aunt had intended should go to her. *Held,* (HISCOCK, C. J. and COLLIN and ANDERSON, J. J. dissenting) plaintiff could maintain the action. *Seaver* v. *Ransom,* (N. Y. 1918) 120 N. E. 639.

At the outset the court, speaking through POUND, J., declared that defendant's testate was not a trustee—"Beman was bound by his promise, but no property was bound by it; no trust in plaintiff's favor can be spelled out." In the very last sentence of the opinion, after discussing the doctrine of *Lawrence* v. *Fox,* 20 N. Y. 268, and the later New York cases applying that doctrine, the court said: "The equities are with the plaintiff, and they may be enforced in this action, whether it be regarded as an action for damages or an action for specific performance to convert the defendants into trustees for plaintiff's benefit under the agreement." In the reaction against *Lawrence* v. *Fox* limitations were placed upon the doctrine allowing third parties to sue that were illogical and in many respects unfortunate. If an action by a third party—creditor is to be allowed, it would seem *a fortiori* that the same privilege should be extended to a donee—beneficiary, for in this class of cases the resulting difficulties in denying the action are palpably greater than in the former class. The New York Court, however, announced the doctrine that the

third party could not sue unless the promisee owed the third party beneficiary some "legal or equitable duty" which would be satisfied by performance of the promise. *Durnherr* v. *Rau*, 135 N. Y. 219. This would seem to eliminate donee—beneficiary. However, the existence of a *moral* duty was deemed sufficient. *Buchanan* v. *Tilden*, 158 N. Y. 109. Even though such duty would not be *satisfied* by performance. In the principal case POUND, J., said he could not "reconcile a decision in favor of the wife in *Buchanan* v. *Tilden*, based on the moral obligations arising out of near relationship, with a decision against the niece here on the ground that the relationship is too remote for equity's ken." Apparently the New York court is nearly prepared to say that if one thinks enough of another to make a gift there is sufficient "moral obligation" to bring the case within the rule. That of course would be equivalent to recognizing that the requirement of any sort of "obligation" in these cases is out of place. See 15 HARV. L. REV. 767; 27 YALE L. JOUR. 1008.

CORPORATIONS:—POWER OF ATTORNEY TO SELL SHARES LIMITED TO ONE STATE, INCLUDING POWER TO SELL SHARES IN A CORPORATION INCORPORATED IN ANOTHER STATE, OWNING PROPERTY IN THE FORMER STATE.—Plaintiff was the beneficial owner of shares in a corporation incorporated in Maine, to own and operate mines in Nevada, with offices in Boston, Massachusetts. Plaintiff and N had originally owned the mining property which had been transferred by them to the corporation in exchange for part of its stock, which, with other parts, was put in trust with B under a pooling agreement. The company became financially embarrassed and a controversy arose between plaintiff, N, and the company as to whether the mining property might not revert to N and the plaintiff. The mining operations had been practically suspended, and plaintiff had gone to Calgary, Alberta; N had brought suit against the company in his own name, and had had a conference with the attorney of the company looking to a settlement of his and the plaintiff's claims against it. Plaintiff was notified by N of the situation and under these circumstances plaintiff gave N a power of attorney to demand and receive sums due plaintiff "for or in respect of any shares, stock, or interest, which I may now or hereafter hold in any corporation," and "to sell and absolutely dispose of such shares," and "to act in relation to my estate and effects, real and personal" as fully as if personally present myself, but "this power of attorney to cover the state of Nevada only." N, under this power, sold plaintiff's interest in his shares in this Maine corporation, and plaintiff brings his bill to have the shares returned to him, on the ground the shares were not located in Nevada. *Held*: bill dismissed. *Warner* v. *Brown*, (Mass. 1918), 121 N. E. 69.

The court, by RUGG, C. J., says that the limitation in the power of attorney indicates that it "is to be exercised as to property either physically located within that state or deriving its value from ownership of property physically located" therein. The court recognizes that generally, the property of the shareholder in his shares is distinct from the property of the corporation, and the *situs* of shares is at the residence of the owner, or at the domicile of the corporation, yet in a remote sense a certificate of stock is "an interest in the

property of the corporation, which might be in other states than either the corporation or the certificate of stock," citing *Hatch* v. *Reardon* (1907), 204 U. S. 152, 161. This holds that the New York two cent stamp tax on the transfer of certificates of stock which are actually present in New York is not unconstitutional, because the corporation or its property is located elsewhere, and the court said the "immediate object of sale was the certificate of stock; * * * in a remote sense, the membership or share which the certificate made attainable; * * * more remotely still, an interest in the property of the corporation," yet this does not make the sale a transaction of interstate or foreign commerce, even if the corporation is, and the seller and buyer reside, out of the state."

The court, however, concludes that in this case, "a fair interpretation" of the terms of the power of attorney made it effective "respecting all properties which derive their value from real or personal estate located within the state of Nevada," whether owned directly, or indirectly through stock ownership in a corporate owner. This seems to be a rather forced construction, and greatly stretches the quotation from the *Hatch* case above. Nothing but the circumstances surrounding the transaction can justify the decision, if that is sufficient.

DEEDS—DELIVERY—MANUAL TRANSFER TO GRANTEE UNNECESSARY.—When defendant was six years old and living with K as a member of his family a deed of certain land was prepared by K and placed in his safe in an envelope indorsed in defendant's name. Defendant had access to this safe from childhood. There was evidence that K had declared that the land was defendant's, that he, K, was only an overseer, and that he had acquiesced in acts of ownership by defendant. One witness testified that K told him to go after K's death to the safe with defendant and take out the papers, one addressed to witness and one to defendant. The will of K did not purport specifically to dispose of the land described in the deed. In an action of ejectment by K's heirs it was *held* that the deed to defendant had been delivered. *Kanawell* v. *Miller* (Pa., 1918) 104 Atl. 861.

Undoubtedly courts are coming to appreciate more and more that delivery does not depend upon any particular formality, that a deed has been delivered whenever there is satisfactory proof that the maker has evinced his intention that the instrument shall be as to him a completed legal act. See 16 MICH. L. REV. 580, *et seq.*, and Professor H. T. Tiffany in 17 MICH. L. REV., 103, *et. seq.* Obviously an actual handing over of the document to the grantee or to some third party for the grantee is of the very best sort of evidence to show such intention. However, such a transfer if the requisite intention is lacking is not necessarily a delivery. See *Curry* v. *Colburn*, 99 Wis. 319; *Tewksbury* v. *Tewksbury*, 222 Mass. 595. Normally a deed which has remained under the physical control or in the possession of the maker has not become operative for lack of delivery, but there are many cases wherein, as in the principal case, the courts have found sufficient evidence of the necessary intention despite such continued control or possession. See the many cases cited in note 8, 17 MICH. L. REV. 105.

ELECTIONS—NON-CONSTITUTIONAL OFFICES—WOMEN.—The Constitution of North Dakota limited the elective franchise to male persons. *Held*, that this does not preclude the legislature from authorizing women to vote for village officers who are created by it since the legislature has plenary powers to regulate the affairs of municipalities. *Spatgen* v. *O'Neil et al.*, (N. D. 1918), 169 N. W. 491.

The court refused to express an opinion whether women could vote for all non-constitutional officers but it suggested that it believed in the affirmative. The decision is confined to cases arising in the regulation of local government. In *Belles* v. *Burr*, 76 Mich. 1, where the legislature was entrusted with the creation of school districts women could vote in school elections, but see *Coffin* v. *Kennedy*, 97 Mich. 188. Women were allowed to vote on matters of public improvement in *Spitzer* v. *Village of Fulton*, 172 N. Y. 285. There is some authority to the contrary. In *People ex rel. Van Bakkelen* v. *Canaday*, 73 N. C. 198, the legislature could not change the period of residence of city electors since the Constitution applied to all elections—which was construed to include general and local elections. In *Board of Election Commissioners of the City of Indianapolis et al.* v. *Knight* (Ind.), 117 N. E. 565, the court held that the description in the Constitution designating who are entitled to vote is exclusive of all others, on the principle that *expressio unius est exclusio alterius*. See also *State ex rel. Allison* v. *Blake*, 57 N. J. L. 6. But in *Scown* v. *Czarnecki*, 264 Ill. 305, L. R. A. 1915 B, 247, the court went farther than the principal holding and decided that the legislature could extend the suffrage to women in all cases of election of non-constitutional officers. The court reasoned that the power of the legislature is unlimited except as restricted expressly or impliedly by the Constitution; hence the vote could be extended without regard to constitutional limitations in matters wholly without the constitutional sphere. This conclusion does not seem any less logical than the conclusion reached in the principal case.

GOODWILL OF A REAL ESTATE AND LOAN BUSINESS.—Ellsworth and Jenkins agreed to dissolve their partnership as dealers in real estate and loans. Jenkins continued to act as liquidating partner for four years, to the time of his death. After his death his administrator, Macfadden, the widow of Jenkins and a clerk formed the Ellsworth-Jenkins Company to deal in real estate, and took over the old business. Mrs. Jenkins claimed that the goodwill of the Ellsworth and Jenkins firm should be reckoned as worth $4500 to the new company. *Held*, that the goodwill should have been accounted for as an asset of the decedent's estate, and as worth that sum, (N. Dak. 1918), 169 N. W. 151.

This decision shows an encouraging tendency of the courts to get away from the *a priori* method of reasoning by starting from a fixed definition and attempting to bring the facts of the case within the definition in order to determine the rights of the parties. The court begins in the time honored way by citing various definitions including of course Lord Eldon's in *Cruthwell* v. *Lye*, 17 Ves. 335, 346, that "good will * * * is nothing more than the probability that the old customers will resort to the old place." The court shows the in-

sufficiency of this and cites other definitions that improve upon it, but then, in place of making another definition under which the present set of facts might be brought, the court goes straight to the heart of the matter by saying that "The law as other big institutions of modern society, is advancing. It has broadened in its conception of human rights, including property rights." It concludes that we have here a property right of value and that the value has been assessed by the lower court at the right amount. By thus turning from the rule of law to the simple question of the right of the party claimant the court arrives at a correct conclusion by a perfectly simple process avoiding all the pitfalls of the logical syllogism with its possible errors arising from a divided middle and incidentally also avoids the enunciation of another definition of goodwill with which to trouble us.

INJUNCTION-SALE OF BUSINESS—AGREEMENT NOT TO COMPETE.—D sold his business and good will to A and, as part of the consideration, agreed that he would not "directly or indirectly enter into business in Sioux Rapids, Iowa, in competition with" A for five years. A sold the business and good will to P to whom A assigned the "contract" with D. D re-entered business in competition with P. Bill by P to restrain D from entering into competition with him in violation of the agreement. *Held*: Injunction should be granted. *Sickles et al.* v. *Lauman,* (Iowa, 1918) 169 N. W. 670.

The defendant contended that the contract gave to A a mere personal right which could not be assigned to P, the second purchaser of the business. This argument had no weight with the court; for the question had been already settled in Iowa. *Hodge, Elliot & Co.* v. *Lowe,* 47 Iowa 137. This is in accord with the views of nearly all courts. As was well said in *Francisco* v. *Smith,* 143 N. Y. 488, "such an agreement is a valuable right in connection with the business it is designed to protect and going with the business it may be assigned and the assignee may enforce it just as the assignor could have enforced it, if he had retained the business. The agreement could have no independent existence or vitality aside from the business." Even if the covenant or agreement had not been assigned, the assignee (purchaser) of the business would be entitled to enforce it. *American Ice Co.* v. *Merkel,* 109 App. Div. 93; *Fleckinstein* v. *Fleckinstein,* (N. J. Ch.) 53 Atl. 1043. Conveyancing forms do not permit a covenant to be made with a business, but such is the intent of the parties. The purpose is to give additional value to the business sold; and as the covenant is designed primarily to protect the business sold it ought to 'run' with the business. In fact it seems preferable to treat such a covenant as an equitable servitude.

LIBEL,—PRIVILEGE, EXCESS, PUBLICATION TO A CLERK.—Under an agreement between defendants and M, the latter selected plaintiff, Roff, as an arbitrator. Defendants then wrote M, "We decline to accept a man with the German name of Roff as arbitrator." The letter was sent in the usual way by post to M, where it was opened by one of M's clerks, who placed it upon the desk of another clerk, who gave it to M. Plaintiff was not a German at all, and on learning of the facts, sued the defendants for libel, in the publication to M.

Defendants pleaded privilege, and the jury found there was no *malice* in the publication to M. The trial court ruled that "the publication to the clerks was not privileged, even if the writing to" M was, and judgment was entered for the plaintiff. On appeal by defendants, *held*: the publication to M was *prima facie* privileged, and this privilege, in the absence of malice, is not lost by the publications to the clerks. *Roff* v. *British and French Chemical Co.*, (Court of Appeal, K. B. D., Nov. 1918), 87 L. J. R. (K. B.), 996.

SWINFEN EADY, M. R., held that since both defendants and M had a common interest in the selection of an arbitrator, the occasion was *prima facie* privileged, unless there was malice to rebut the *prima facie* protection, and the jury had negatived any malice. The other judges agreed. It was further argued that the mere fact that a defamatory communication, *prima facie* privileged, is communicated to a third person having no interest, is in excess of the privilege and destroys it. But the court held otherwise, relying on the cases of *Pullman* v. *Hill*, (1891), 1 Q. B. 524; *Edmondson* v. *Birch*, (1907), 1 K. B. 371, and others reviewed in note in 17 MICH. L. REV. 187.

All the judges held that the action was not for a publication to the clerks, but only to M, and hence the trial justice's instructions that the publication to the clerks was not privileged, was not applicable and was misleading. They seemed to think that a separate action might possibly have been maintained for the publication to the clerks. This matter is covered in the note in the MICHIGAN LAW REVIEW above referred to.

PUBLIC UTILITIES OPERATING AFTER EXPIRATION OF FRANCHISE—ORDINANCE FIXING RATES.—A street railway company furnished the exclusive service to defendant city. On 150 miles of the lines the franchises had expired, 65 miles were under a "three-cent franchise," and 55 miles of disconnected sections of tracks in outlying streets were under "five-cent franchises," which had not yet expired. The city on August 9, 1918, passed an ordinance in terms amendable or repealable at any time, limiting fares that might be charged on franchise lines to franchise rates, and on non-franchise lines to a maximum of five cents. The ordinance expressly provided that it should not be construed to impair the obligation of any valid contract. The Supreme Court of the United States found the enforcement of the ordinance on the averments of the bill, which for the purposes of the hearing must be taken to be true, would result in a deficit to the company. The rates fixed did not provide a reasonable return, and therefore deny to the company due process of law. The District Court should have granted a temporary injunction and proceeded to a hearing and determination of the case. *Detroit United Railway* v. *City of Detroit*, United States Supreme Court, No. 666, January 13, 1919.

Little need be added to what was said on the *Denver Water Case*, 246 U. S. 178, in 16 MICH. L. REV. 438. The case simply follows that case, and from this three justices dissent, as they did in that case. The only difference between the two seems to be that in the Detroit case the company has certain unexpired franchises, so that the city is not free to operate a complete system of its own by driving the company from the streets, and the company is on the non-franchise streets only by sufferance. The court has constructed a

situation of the man and the bear at grips, and neither can let go because each has to have the other. Meantime the bear does not seem to be suffering, since the courts forbid the man to do anything to kill him, or even to prevent his having plenty of sustenance, provided always he will not be too hard on the man. The court will umpire the contest, but it seems to remain a perpetual draw, which worries the city but is at most a slight annoyance to the company.

RAILROADS—INJURIES AT CROSSING—STATIONARY GONG—CONTRIBUTORY NEGLIGENCE—QUESTION FOR THE JURY.—The plaintiff Guest and his automobile were injured in a collision with the defendant's passenger train at a crossing. There was evidence tending to show that the automatic stationary electric gong failed to ring as the train approached; that the plaintiff failed to stop, look, or listen before attempting to cross; that a signboard partially obstructed his view of the track. *Held*, that the question of contributory negligence was for the jury even though the plaintiff failed to stop, look and listen—if the automatic gong failed to ring. *Bush* v. *Brewer et al.*, (Ark. 1918), 206 S. W. 322.

The failure to sound the stationary gong created an exception to the general rule that where a traveler does not use his senses to guard his own safety the question is purely one of law for the court. It became a question for the jury to decide whether the plaintiff was actually negligent in failing to look and listen for approaching trains while behind the signboard, since the silence was in a measure an invitation to the public to cross. The *dissenting* views admitted that the opening of a gate operated by a flagman is an invitation to cross but insisted that there is no such invitation when a gong fails to ring since such contrivances are known to be out of repair frequently. The courts are by no means agreed as to the effect of a reliance on the absence of customary warning signals situated at crossings. The principal case is supported by *Tobias* v. *Railroad Co.*, 103 Mich. 330, where the question was left to the jury even though it was clear from the evidence that the plaintiff could have seen the train had he looked. But other cases hold that the question is still for the court if the traveler has failed to stop, look and listen; the failure of the automatic gong to ring does not justify any relaxation of vigilance. *Conkling* v. *Erie R. R. Co.*, 63 N. J. L. 338; *Jacobs* v. *Railway Co.* 97 Kansas 247; *McSweeney* v. *Erie R. R. Co.*, 87 N. Y. Supp. 836. The conflict appears also among the gate cases. In *Koch* v. *Southern Cal. Ry. Co.*, 148 Cal. 677 the court declared that the traveler could rely on the raising of the gates but that he had to look and listen nevertheless; otherwise he could not recover as a matter of law—"he must show more as to his conduct than that he so relied." The dissenting opinion in the California case cited many cases to prove that the raising of the gates was an invitation to cross and that this was enough to make a jury question. *Geoffroy* v. *New York N. H. & H. R. Co.*, (R. I. 1918), 104 Atl. 883 decided last month, is in accord with the theory of the principal case but it adds a qualification which the principal case did not have to consider. The Rhode Island court admitted that the opening of the gates brought the question to the jury even though the plaintiff did not stop, look, and listen where it was possible that he exercised due care notwithstanding

such failure to use his senses—the location of the gates whether in a city or in the country, the presence or absence of traffic on the highway, the presence of obstructions or the presence of the gateman are all circumstances which might call for a reliance on the signal without resorting to other precautions; but where the evidence clearly showed that he could have seen the train had he used his senses the question was for the court as a matter of law. This last case seems to meet the situation satisfactorily since it allows no undue relaxation of vigilance but at the same time recognizes the psychological element—the apparent invitation—where it is a controlling motive in causing the traveler to cross. The distinction raised by the dissenting view in the principal case is a technical one but not a real one. It discovers a difference in causes but no difference in effects. Whether the controlling agency of the device is a human being or a contrivance is immaterial so long as it can be shown that the psychological effect may be the same—that the traveler thereby actually becomes "less cautious in looking for the coming of a train."

SPECIFIC PERFORMANCE—MUTUALITY OF REMEDY.—A employed B, an attorney at law, to represent him in certain actions in which he (A) was involved. As consideration for services rendered it was agreed that, on the final determination of the actions, A should turn over to B certain shares of stock. B performed the services, but A refused to carry out his part of the agreement. Bill by B for specific performance. Defense: want of mutuality of remedy. *Held*: Specific performance decreed. *Roche et al.* v. *Madar et al.*, (Wash. 1918) 175 Pac. 314.

Mutuality of remedy continues to raise its head with the persistence of Banquo's ghost. It would seem clear that it has no application to a unilateral contract nor to a bilateral contract fully performed on one side. While it is true that equity would not compel B to perform personal services for A, yet the authorities are practically unanimous that, when B has performed the services, he may compel A to perform. Such a result seems inevitable; for it would be most unjust if A who has already received the promised equivalent for his performance, were permitted to plead that he could not have compelled the performance he has received. Yet the uniformly unsuccessful attempts of parties in such a situation to resist performance indicate confusion in the minds of many lawyers as to the real meaning of mutuality. The final word on the subject has been spoken by Ames. Mutuality in Specific Performance, 3 Col. Law Rev. 1; Lectures on Legal History, 370. Cf. Pomeroy, Contracts (ed. 2) §§ 162-174.

TRESPASSING CHILD—LIABILITY FOR NEGLIGENCE TOWARD.—Defendant left his automobile standing at the proper place near the curb on a street, while he was gone about twenty minutees. On his return he found the plaintiff, a small boy about four and one-half years old, with several other small children, upon the right hand running board of his car, near the curb. They asked for a ride. Defendant refused this and drove them away. He then cranked his car, got in it on the left-hand side, noticing that the plaintiff was then on the left-hand running board. The car had a right-hand drive.

There was conflict in the testimony at this point, defendant claiming he had "shoved" plaintiff away a short distance before starting his car, and did not know he was on the running board at the time. Plaintiff's testimony was to the effect that he had remained on the running board, until he was thrown off by the starting of the car. Defendant asked the court to instruct the jury that he would be liable only if he knew plaintiff was on the running board when he started, and, after he drove him away (if the jury so found) he was under no further duty toward him for neglecting to investigate to find out if he was upon the running board. This request was denied. The court instructed that defendant was bound to know a child of such age might act upon a childish impulse, and if he was so close to the car, when it was started, and his conduct such as to lead a prudent man to believe he was about to jump upon the car, you have a right to inquire what ordinary care and prudence required of the defendant under the circumstances. Defendant excepted to this instruction. Judgment for the plaintiff by the trial court was reversed by the Court of Appeals, and this was reversed by the Supreme Court of Ohio. *Ziehm* v. *Vale* (Ohio, 1918), 120 N. E. 702.

The Court of Appeals relied upon two earlier cases, *Railroad Co.* v. *Harvey*, and *Swartz* v. *Akron Water Works Co.* (1907), 77 O. S. 235. The *Harvey* case was one in which a boy five or six years old was injured while swinging on an unenclosed, unlocked, and easily accessible railroad turntable, in a village where children were known to be in the habit of playing. The *Akron* case was one in which a small girl was drowned by falling into the water works reservoir situated on a high hill partly in the city, where people resorted frequently to enjoy the view,—the reservoir being surrounded by a picket fence three feet high, through a hole in which, due to the loss of two pickets, the small girl and two others climbed, and the former fell down the steep inside bank into deep water and was drowned. Judgments for plaintiffs in both cases were obtained which were reversed for error in overruling the defendants' motions for directed verdicts. "The distinction between the legal duty due uninvited persons, in cases arising from the construction of the premises, and in those arising from their negligent operation, is clearly made", according to the court, in *C. H. & D. R. R.* v. *Aller*, 64 O. S. 183, and is made the basis of the decision in the *Ziehm* case above. WANAMAKER, J., in concurring, registers a vigorous protest against the implied approval of the *Harvey* case, saying it astonished the profession, and indicated the high water mark of the court" in its effort to magnify property right and minimize personal right,—the right to life, limb, health, and safety—especially when applied to a child 4½ years of age." The distinction between *active* and *passive* negligence in similar cases, on which the *Ziehm* case is based, is fairly well established, but admittedly difficult of application. See *Fitzpatrick* v. *Glass Mfg. Co.* (1898), 61 N. J. L. 378, and *Gallagher* v. *Humphrey* (1862), 6 L. T. R., N. S. 684. The turntable cases are in hopeless conflict, as shown in the *Harvey* case where an effort is made to classify them.